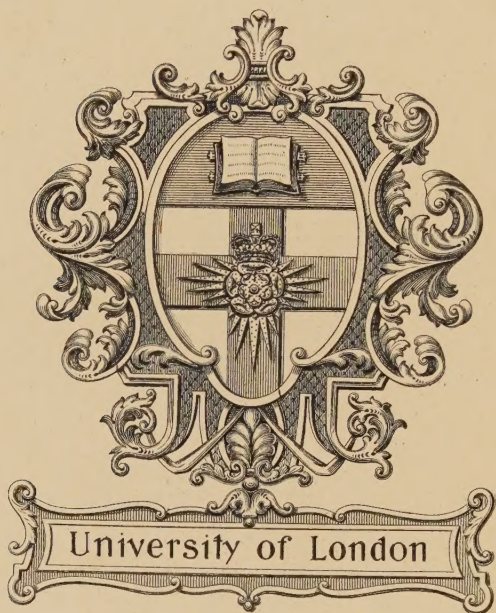


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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

GRINHAM *v.* GRINHAM AND PASCOE.

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*Divorce—Practice—Petition by Husband (Poor Person)—Wife's Answer—
Security for Costs—Alimony pending Suit—Rules of the Supreme
Court (Poor Persons), 1914.*

Oct. 18 ;
Nov. 15.

Where a husband is petitioning for a divorce as a "poor person" within the meaning of the Rules of the Supreme Court (Poor Persons), 1914, the registrar may, nevertheless, consider an application by the wife (respondent) for security for costs and may also make an allotment of alimony pendente lite.

The Rules of the Supreme Court (Poor Persons), 1914, do not preclude the old practice of the Divorce Court being followed in regard to applications by a wife (respondent) for security for costs and for alimony pendente lite.

THE arguments were heard and the judgment was delivered in chambers, but the case is reported at the request of the learned judge.

This was an application, by summons, on behalf of the respondent for the petitioner to show cause why the order dated July 31, 1914, giving the said petitioner leave to sue as a poor person, should not be rescinded.

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The facts sufficiently appear from the registrar's report as to the petitioner's income, which was as follows :—

“ In this case the petitioner applied for leave to sue under the provisions of the Rules of the Supreme Court (Poor Persons), 1914. His case was reported upon, and on the 30th day of July, 1914, an order was made admitting him so to sue.

“ On the 14th day of December, 1914, the respondent filed a petition for alimony, to which the petitioner put in his answer on the 7th day of January, 1915.

“ In the latter he admitted that his nett earnings for the last twelve months have averaged 2*l.* to 2*l.* 10*s.* weekly, and a statement by his employers that his average earnings amounted to over 260*l.* a year was found among the papers. This was drawn to the attention of Mr. Justice Bargrave Deane, who thereupon directed the registrar to inquire and report upon the respondent's income for the last three years, and that the hearing of the cause be stayed meanwhile.

“ On the 2nd day of March, 1915, the petitioner was cross-examined before me by the solicitor for the respondent as to his means.

“ The facts appear to be as follows :—He is a journeyman tailor, employed by Messrs. Hawke & Co. of Savile Row, military tailors.

“ During the year 1912 his earnings averaged 6*l.* a week.

“	“	“	1913	“	“	“	5 <i>l.</i>	“
“	“	“	1914	“	“	“	6 <i>l.</i> 5 <i>s.</i>	“

“ Average for three years one-third of 17*l.* 5*s.* = 5*l.* 15*s.*

“ Out of this he pays two assistants 25*s.* a week each . 2*l.* 10*s.*

“ The expenses of his work room, gas, and cotton	
amount to	13 <i>s.</i>

3*l.* 3*s.*

“ His nett income weekly = 5*l.* 15*s.*

— 3*l.* 3*s.*

2*l.* 12*s.*

“ During six months of last year he also earned from 2*l.* to 3*l.* a month from another firm, named Collins, of Maddox Street, but he proposes to do no more work for them.

"For some time he allowed his wife 32s. to 35s. a week. This he reduced to 12s. when he took away the two boys, aged seventeen and fourteen, at her request, and to 8s. (for the daughter exclusively) after he had been informed that the respondent was pregnant by the co-respondent.

"Other material facts are, that he has 10*l.* in the bank 'in case he were ill, for the boys,' and that he has paid his own solicitor 10*l.*, nominally for out of pocket expenses, though no expenses to that amount were proved before me (see Order XVI., r. 29).

"The question under these circumstances is whether the petitioner is entitled to sue under the Rules for Poor Persons. Two cases were referred to in argument, viz. : *Kydd v. The Watch Committee of the City of Liverpool* (1) and *In re Atkin's Trusts, Smith v. Atkin.* (2)

"In the former case Buckley L.J. said that the expression 'worth 25*l.*' meant 'not that a man actually had 25*l.*, but what a banker meant when he might say, in answer to an inquiry, that a customer was good for 25*l.*' "

The summons was heard in chambers by Bargrave Deane J. on October 18, 1915, and, after argument, was adjourned by the judge for the purpose of considering his decision.

T. Bucknill, in support of the summons.

R. F. Thacker, for the petitioner, contra.

Nov. 15. BARGRAVE DEANE J. (in chambers), in giving judgment, said that, after consulting the learned President (Sir Samuel Evans), he was of opinion that there was nothing in the Rules (3) to interfere

(1) (1908) 24 Times L. R. 257.

(2) [1909] 1 Ch. 471.

(3) The Rules of the Supreme Court (Poor Persons), 1914, dated April 6, 1914. Order XVI., r. 29, is as follows :—

"When a person is applying or is admitted to take or defend or be a party to any legal proceedings as a poor person he shall not be liable for any Court fees or fees on taxation of costs nor unless the Court or a judge shall otherwise order to pay costs to any other

party, except as provided by the rules of the Order; and no person shall take or agree to take or seek to obtain any fee, profit or reward, either for enquiry or report or for the conduct of the proceedings; and any person so doing shall be guilty of a contempt of Court. If any such fee, profit or reward shall be given or promised the application or admission, as the case may be, may be dismissed or struck out, in which case the poor person shall

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with the powers of this Court in matrimonial cases to order the husband, who was suing as a poor person, to give security for the wife's costs and to pay the wife alimony pending suit.

In future, in such cases, the registrar might proceed in the old way to consider applications for security for wife's costs and for alimony pendente lite ; but the registrar would, of course, consider each application very carefully, bearing in mind the fact that he was dealing with the case of a poor person.

In the present case the order would be that the petitioner should not be dispaupered, but that the matter be referred to the registrar to direct, if he think fit, that the petitioner give security for the wife's costs, and that he pay to her alimony pendente lite, the amount in each case to be considered and fixed by the registrar.

Solicitor for petitioner : *R. G. Taylor.*

Solicitor for respondent : *F. Freke Palmer.*

not afterwards be admitted as a party to the same cause or proceeding as a poor person unless otherwise ordered. Provided that nothing contained in this rule shall preclude any solicitor from receiving either from the poor person or out of any fund which may from time to time be approved by the Lord Chancellor the payment of the out-of-pocket expenses of any solicitor."

Rule 28A (dated December 18, 1914):

"The Court or a judge may at any time (and whether or not any application be made by any person for such purpose) discharge any order made under these Rules whereby a person has been admitted to take proceedings as a poor person or to defend or be a party to any proceedings as a poor person."

H. D. G.

HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

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ADMIRALTY.

[IN PRIZE.]

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[1914 No. 83.]

Prize Court—Outbreak of War—Days of Grace—Hague Convention No. 6 (1907)—Non-application to an Enemy Yacht—"Navire de commerce"—Repairs—Dry-docking—Concession by Crown.

A yacht is not a "navire de commerce," and, therefore, is not entitled to the protection in respect of days of grace, &c., conferred on a merchant ship by the Sixth Hague Convention (1907), art. 1.

In the case of an enemy-owned yacht seized, on the outbreak of war, in a British port, and subsequently condemned and ordered to be sold, claimants sought to recover from the Crown the cost of necessary repairs executed before the seizure, together with the expenses attending subsequent dry-docking, and, as an act of grace, the Crown consented to the assessment of these amounts by the Registrar and merchants.

Observations on the effect of non-compliance by one belligerent with the terms of the Hague Convention to which he is a party.

ON July 27, 1914, the steel sailing yacht *Germania*, of the estimated value of 45,000*l.*, and belonging to a German subject (Herr Gustav Krupp von Bohlen), arrived at Cowes, in the Isle of Wight, from Norway to take part in the racing. War broke out on August 4 between Great Britain and Germany, and on August 6 the yacht was seized, and a writ was issued on August 26. On September 24, pending an inquiry as to the status of the vessel under the Hague Convention, an order for detention was made; but to prevent the vessel deteriorating, leave was given to the claimant, Baron von Bulow, as the agent of the owner, to dry-dock and paint the vessel at the expense of the claimant, and without any lien or claim as against the Admiralty Marshal.

The Solicitor-General now applied on behalf of the Crown that the order of detention should be superseded by an order for the condemnation of the yacht as enemy property, the contention of the Crown being that the yacht did not come within the terms of

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art. 1 of the Hague Convention No. 6 (1907), not being a merchant ship ("navire de commerce"). (1)

The Solicitor-General (Sir F. E. Smith, K.C.) and A. B. Marten (for *G. T. Simonds*, serving with His Majesty's Forces), for the Crown. It is submitted that the suggested status of the vessel, under art. 6 of the Hague Convention, has no foundation, as that Convention deals, and purports to deal, only with merchant vessels. In the case of the steam yacht *Oriental* (2), belonging to a subject of the kingdom of Hungary, which had gone to Cowes to take part in the regatta and was there found on the outbreak of war, the judgment pronounced in this Court on March 8, 1915, contains the following passage: "The Crown contends that although days of grace were accorded, that in truth, and in fact, this vessel is not a vessel to which the Hague Convention applies at all. The Hague Convention applies only to merchant vessels. The preliminary article to the sixth Convention shows that the object was to secure the safety of commerce as far as possible, and the French version—which is the authoritative one—describes vessels which come within the purview of that Convention as 'navires de commerce.' This is not a vessel coming within that category at all. Nevertheless this country was willing to give some days of grace as a matter of fairness due to the comity of nations; and certain days of grace were allowed as a favour to this vessel. For some reason she was not able to avail herself of the days of grace which were given, and she remained there until the time would have expired if she had come under the Hague Convention. It is quite clear on these grounds that this vessel was enemy property at the time of seizure and was confiscable, and therefore I order that the vessel be condemned and sold and the proceeds of her sale be paid into Court."

As to the claims of Ratsey & Lapthorn, Limited, and Pascall, Atkey & Son, Limited, of Cowes, in view of the fact that the work

(1) Hague Convention No. 6 (1907), art. 1: "When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it

should be allowed to depart freely, either immediately or after a reasonable number of days of grace . . ."

(2) Lloyd's Prize Cases, vol. i., p. 355.

performed and material (in the shape of sails, and other necessities) supplied by these firms was before the outbreak of war, the Crown is prepared, by way of concession, and without admitting any liability, to consent that these claims should go before the Registrar and merchants on the question of amount. (1)

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According to the affidavit dated October 14, 1915, of William Summers, a director of Summers & Payne, Limited, yacht builders and brokers carrying on business at Southampton, the claim of that firm is for necessities supplied and moneys advanced to the master to pay wages, maintenance, and passage home of the German master and crew, the vessel carrying an English skipper and mate as well as a German captain and crew. The temporary repairs, which included repairs to the keel and docking, amount to 176*l.* 2*s.* 6*d.*, whilst the advances amount to 400*l.*, and the vessel has been berthed, at the request of the Registrar of Shipping at Southampton, in the firm's yard since December 20, 1914, where she still remains. The affidavit further states that "the grounds upon which my firm base their claim are that the work done or materials supplied by them were necessary for the preservation and maintenance of the *Germania*, and that they have or had a lien on her for the amounts claimed. My firm fully recognize that such work as they have done on the yacht, and the money they have parted with, has been done quite voluntarily, but submit that it is equitable that the advantages that must accrue to the Crown in consequence thereof should be recognized."

With reference to this claim I would draw attention to the judgment in *The Marie Glaeser* (2), in which the earlier authorities are reviewed and the principle adopted that "liens whether in favour of a neutral on an enemy's ship or in favour of an enemy on a neutral ship are equally to be disregarded in a Court of Prize."

As to the claim of Baron von Bülow, as agent for the owner, an appearance was entered on October 29, 1914, and the claim delivered a few days ago. In the affidavit leading to appearance sworn on October 20, 1914, it is stated that "the grounds of my claim are as follows: That, having regard to the

(1) *W. N. Raeburn*, who appeared for Ratsey & Lapthorn, and *Pascall, Atkey & Son*, assented to this course.

(2) [1914] P. 218.

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provisions of the Sixth Hague Convention of the year 1907, and having regard to the Order in Council, dated August 4, 1914, the said vessel is not liable to be condemned as prize. That, having regard to the reversionary interests of my principal in the said vessel and the future liabilities which may be sought to be charged against him, the interests of my principal should be represented herein."

The contention of the claimant is, as I understand it, that no days of grace were allowed, and that the yacht was not allowed to leave. That is not a matter of law, and not a matter of legal obligation, and I need not further deal with it. The second contention is that the yacht is of no value for naval, military, or commercial purposes; but that submission is obviously untenable, because a yacht of this kind can very well be used for ancillary purposes, such as that of a mine sweeper, or mine layer. There has been no difficulty in utilizing the large number of yachts which have been voluntarily placed at the disposal of the Navy in this country. Thirdly, it is alleged that the yacht is not liable to confiscation or condemnation. That point has already been dealt with. Fourthly, it is said that confiscation or seizure is contrary to the comity of nations and public policy and of the Hague Convention; but the comity of nations and public policy can hardly be put forward in this connection, and I have dealt with the Hague Convention.

Bateson, K.C., and *C. R. Dunlop*, for *Summers & Payne, Limited*, yacht builders and repairers, of Southampton and Cowes, and for *Baron von Bülow*, interned at Donnington Hall, and intervening as agent for the owner of the yacht. The vessel in question here is not a steam yacht—she is a sailing yacht, a racing yacht—and it can hardly be said that she is a vessel which could be used in any naval or military sense or that any such vessel has been so used during the time the war has now been going on. Officials from the Admiralty have been down lately to inspect her, and they say that she is of no use. She is not a merchant vessel, and is of no commercial, naval, or military value.

By the comity of nations days of grace in some shape or form have been allowed to enemy vessels before condemnation, and it is submitted that a toy—or whatever you like to call this article, this racing yacht or pleasure yacht—is a fortiori to be given an oppor-

tunity of departing in peace, especially when she came originally as a guest, so to speak, for the Cowes Regatta. If you do not condemn merchant vessels, but only detain them, you certainly ought not to condemn, but only detain, a pleasure vessel of this kind. The principle of days of grace began, it seems, in 1854. In Mr. Westlake's book (*International Law*, part II., War, 2nd ed. (1913)), pp. 42, 43, the following passage occurs: "Since the middle of the nineteenth century it has been the constant practice in declarations of war to name a time within which enemy merchant ships then in harbour may load and depart; and it is usual to add that enemy merchant ships which have sailed from a foreign port before the date of the declaration may enter and discharge their cargoes, and then depart with freedom from molestation on their voyage to any port not blockaded. This, combined with the growing tendency of opinion to favour private enemy property even at sea, may be considered to have made it certain that merchant ships and cargoes in harbour at the outbreak of war and not belonging to the enemy state, with the exception of ships of which the construction indicates that they are intended to be converted into ships of war, would not again be confiscated." It is a sort of dawn of civilization in 1854 that you do not condemn enemy property in port without giving it days of grace, unless it is intended to be converted into ships of war or to some warlike purpose. That is the principle underlying the Hague Convention, and nobody thought, and nobody ever has thought, that a yacht used for pleasure or racing purposes came under the category of vessels that could be converted into ships of war. It is a *casus omissus* no doubt from the Hague Convention, for the very simple reason that nobody would have thought that a plaything of individuals in any particular State would be subjected to confiscation on the outbreak of war. Of course, it is important that the money values in these things should not during the war be available to the individuals. That may be right; but that they should have their pleasure vessels taken away from them altogether when their commerce—which is the thing we want to stop, and which is useful in every sort of way to their naval and military power, which we want to break in every possible way—is protected by the Hague Convention by days of grace does not seem reasonable.

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1915 [THE PRESIDENT. I do not think it could properly be described
THE as a casus omissus, because the Sixth Hague Convention was only
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By these Conventions matters were dealt with which were of value and importance in war to either one side or the other. You want to stop the commerce of your enemy, you want to do away with his naval or military power, but you do not want to attack the private property of a particular individual. This yacht is full of all sorts of private property—carpets, pianos, and the ordinary details of a well-kept yacht—and it is a sort of thing that you do not want to take away from a private individual. The spirit of the Convention, which shows that even commerce is to be protected from the surprises of war, is a fortiori applicable to the gentleman who sends his private yacht over to compete in the Cowes Regatta. Mr. Pitt Cobbett (*International Law* (1913), part II., War) speaks in the same way. At p. 167 he says this: “This exception to the ordinary rule of maritime capture was based on the ground that both good faith and mutual interest required that vessels carrying merchandise to a country for the use of the inhabitants should be protected against the surprises of war.” If that is the principle, then because it has been applied by the Convention to ships of commerce, it does not in the least do away with its being applicable to other cases. This is submitted on behalf of Messrs. Summers & Payne just as much as for the Baron, because if this vessel is condemned Messrs. Summers & Payne run a very grave risk of losing all the money they have expended upon her since she was under detention.

[THE PRESIDENT. I have thrown out from the very beginning of these prize proceedings the probability that vessels which were only detained (as I ordered detention in the case of *The Chile* (1)) might ultimately be condemned.]

There was every reason to believe at the time when they spent their money that they were safe against any confiscation, not absolutely, because one has had the warning that it was not quite safe. Was the warning a warning which was practically a dead letter, or was it a serious risk, looking at it from a business point of view? It is submitted that it was a very fair business risk to

take, and, having taken it, it is hard, indeed inequitable, that now, at such a late period, the yacht should be condemned. Since 1854, so far as our own country is concerned, we appear to have always limited our proclamations to merchant ships, and I can find no case of anybody's racing yacht ever having been condemned. Looking again at Mr. Pitt Cobbett's book (p. 167), it would appear that the proclamations of other nations apply to all vessels, not only to merchant vessels. He says: "This practice began in 1854, when, on the outbreak of the Crimean War, Great Britain and France allowed Russian merchant vessels then in British or French ports six weeks within which to load and depart, whilst vessels which had already sailed for such ports were allowed to enter and discharge their cargoes and return unmolested to any port of their own country not under blockade, Russia making similar concessions. A policy similar in its general tenour, but varying greatly as regards time and conditions, was followed in the subsequent wars. So in the Austro-Prussian War of 1866, Prussia conceded to enemy vessels"—not merchant vessels—"a period of six weeks' grace. In the Franco-German War of 1870 France gave one month's grace to enemy vessels"—leaving out the word "merchant"—"both in port and on their way to port, whilst Germany purported to grant complete immunity from capture, although this was subsequently withdrawn. In the Russo-Turkish War of 1877 Russia only granted to enemy vessels which were then in port time to unload and depart. In the Spanish-American War of 1898, the United States gave one month and exempted vessels on their return voyage, but Spain gave only five days and did not in terms prohibit capture after departure or provide for the entrance or discharge of vessels that had sailed for Spanish ports before the war. In the Russo-Japanese War of 1904, Japan gave seven days to enemy vessels already in port, and allowed vessels that had sailed prior to the 9th February to enter, unload, and return, subject to the observance of certain conditions; but Russia gave only 48 hours, and did not exempt vessels on their return voyage."

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That seems to be shortly the history of these days of grace. After this war broke out the Solicitor-General, in addressing this Court, stated that the British Government had been careful to observe

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the letter and spirit of any obligation entered into at the Hague. It is submitted that although this is not within the letter it certainly is within the spirit of the convention.

It is suggested that the case of *The Oriental* (referred to above) was not quite decided on the ground that yachts were omitted from the Hague Convention, but decided on the ground that this yacht having had her days of grace, being a Hungarian yacht, did not avail herself of them, and therefore was condemned. The Hungarian Government and our own agreed to days of grace.

[*The Solicitor-General.* And the German Government did not. It is stated in the judgment that "The Crown contends that although days of grace were accorded, that in truth and in fact this vessel is not a vessel to which the Hague Convention applies at all. . . . Nevertheless this country was willing to give some days of grace as a matter of fairness due to the comity of nations, and certain days of grace were allowed as a favour to this vessel." That is dealing with a country which had given us days of grace, but we are dealing here with a country which has refused to give us days of grace.]

We are dealing with two different countries, and that is my point. In *The Oriental* the country in question there had agreed to give days of grace, and so had we. Therefore any vessel that belonged to that country, if she was a merchant vessel, would have days of grace, but if she was a yacht the judgment in *The Oriental* says: "This is not a vessel coming within that category at all. Nevertheless this country was willing to give some days of grace as a matter of fairness due to the comity of nations."

[*The Solicitor-General.* And certain days of grace were allowed as a favour to this vessel.]

Yes, she was included in the concession. In this particular case it is submitted that it would be inequitable to Messrs. Summers & Payne to do otherwise than mete out to the yacht the same measure as to the merchant ship, for they have spent money in keeping up this yacht for the benefit of the owner. She arrived on July 27 and was got ready for racing by Messrs. Summers & Payne as usual—docked and overhauled, rigged, &c.—and she was undocked on July 30, they having spent upon her 176*l.* 2*s.* 6*d.* On the same day

they advanced the master 400*l.* on his cheque to send the crew back to Germany. I think that is what it was used for ; but they had an English master and a German master, and an English mate and a German crew. And the English master, I think it was, obtained this 400*l.* on his cheque on the Dresdner Bank on July 30. They did not put it through quite quickly enough ; the result was that it was dishonoured and then another cheque of 200*l.*—

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[THE PRESIDENT. That was money to enable them to get back and take their part as German soldiers.

The Solicitor-General. Or in the navy.]

No doubt. I do not know what happened to them ; presumably they were called back, because they were seamen, and seamen would be useful.

[*The Solicitor-General.* They want us to pay 400*l.* to send sailors back to the German Navy.

THE PRESIDENT. Or soldiers back to the German Army.]

Messrs. Summers & Payne have got a possessory lien on this vessel in their yard.

[THE PRESIDENT. In respect of the 400*l.*]

Yes, it is largely wages ; perhaps it is only a maritime lien. But at any rate, for the docking and overhauling they would have a possessory lien. They paid this money for wages, it did not cost 400*l.* to send these men back—it was to pay wages due, 400*l.* in one cheque and 200*l.* in another. That is what they paid and what they would recover from the owner of the interned article no doubt when he came to claim his vessel after the war. Then the vessel is seized on August 6, and the writ is issued on the 26th and the order for detention is on September 24, 1914. Messrs. Summers & Payne pointed out to the Marshal that the vessel must be unrigged and care must be taken of her, and with his knowledge and consent, but with express notice that he will not pay, they undertake the work, looking to the owner for payment. On October 14 the collector of customs at Southampton says : “Gentlemen, I beg to inform you that the Admiralty Marshal to whom I referred your letter agrees, and is so advised by his brokers, that this work would be highly desirable”—that is, unrigging her and storing and housing the gear—“but that he has no authority to incur the expense. He

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would, however, have no objection to the work being done if you care to undertake it, looking to the owner for ultimate payment if and when the vessel is returned to the owner."

[THE PRESIDENT. The order of August 6, which has reference to the dry-docking and painting, says that if they care to do it it must be done at their own expense.]

There are two operations. The one is the housing of the gear. This racing gear deteriorates very quickly. You have to house that; and the other operation is the keeping of her clean and painting her bottom with composition to prevent it pitting. The first operation was done on this letter. We know she was detained by order of this Court on September 24. We then point out to the Marshal that she ought to be unrigged and her gear stored, and the reply is, "She ought to be, but you must look to the owner." There is no suggestion here that we should do it at our own expense, "looking to the owner for ultimate payment if and when the vessel is returned to the owner. The Marshal, however, can himself give no guarantee of payment. Should you undertake the work I shall require to be satisfied that all this gear is placed in safe custody in the same way as the rest of the gear, &c., from this yacht."

[THE PRESIDENT. "If and when the vessel is returned."]

Quite so, but at any rate what the Marshal invites us to do is this work and to look to the owner for payment. He does not suggest that we should do it at our own expense, and that is repeated on November 5 by a second survey of the vessel, when we get an opportunity of looking at the cabins. The same expression is again used: "You must look to the owner for ultimate payment if and when the vessel is returned to the owner." That work was done, and the cost was 252*l.* 7*s.* 10*d.* Then finally we took out a summons to dry-dock her and paint her, and the order was made that we should do it.

[THE PRESIDENT. That you might do it at your own expense.]

Yes.

[THE PRESIDENT. In the previous letter of October 9 from you to him you point out that these things ought to be done, and you said they could be done, and you add this: "The owner is an old and esteemed customer, and we should be prepared to do this work,"

as we feel sure we should receive the cost from him when at the end of the war matters of ownership are settled.”]

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That is to say, assuming she is a detained ship. This is after she has been detained and after the order for detention is made; no claim to confiscate, and everybody assuming that she was going to be detained like all the other vessels and eventually probably returned to the owner. Then, of course, the risk of getting repaid is a risk which with a respectable yacht owner one will dare to run, saying: “We have got no contract with him; we could not force him to pay; but we know that people who indulge in things like yachts pay their bills without much trouble, and we regard this property as committed to our charge before the war began”—that is the real position in which it was—“and we will take care of it in the meantime, but if it is going to be condemned we do not suppose the owner will be willing to pay sums of money which have gone into the pocket of whoever realizes it.” That is the position in which we have been placed. We have been led into the position of doing the work for the owner and getting paid when the war is over. Then twelve months after, nobody having dreamed of this subsequent application being made to sell the yacht, suddenly we find ourselves with no boat to hold on to for the previous work which we have done to her, and for which we had a possessory lien, and we have no redress, and it is not fair that the Crown should take advantage of Messrs. Summers & Payne’s work which has been done on this yacht to keep her in condition, to keep her up to the value which she will fetch when she is marketed; the Crown will get the benefit of all their labour and Messrs. Summers & Payne will have nothing for it. With regard to the earlier matters before the war broke out, it is submitted that we had a possessory lien on the ship, and I do not know of any case which says that the Prize Court has no regard to a possessory lien.

[THE PRESIDENT. That is in respect of the 176*l*. You were not exercising your possessory lien. You did not look to the ship. You looked to your “old and esteemed customer.”]

No doubt, but still we had the possessory lien, though we should not have put it in force against the owner because he would have paid. But if you are going to shut him out we are certainly

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looking to the possessory lien because ex hypothesi the Attorney-General on behalf of the Crown is going to say "Shut him out."

[*The Solicitor-General.* The Marshal has got the ship now. The ship is in the possession and custody of the Marshal.]

She is in our yard at the present moment.

[*THE PRESIDENT.* Possession is apparently in the Crown—the Marshal's hand is upon her.]

I am not quite sure, but I think in ordinary cases where the Marshal steps in—take, for instance, the possessory lien of a dock company—he does oust the dock company for the time being.

[*THE PRESIDENT.* What lien results from the payment of the money for the necessities?]

There is no maritime lien for anything except wages, and that is certainly doubtful. What is submitted is that the Crown would have had so much the less to sell if it had not been for the moneys of my client being put into this vessel.

[*THE PRESIDENT.* In other words, what you voluntarily spent on the vessel enures to the benefit of the captors if the vessel is condemned.]

Yes, and in accordance with the equitable principles on which these cases are decided, if my clients have spent money to preserve this chattel the Crown ought not to get the chattel without making good to us that money which we have spent.

[*THE PRESIDENT.* The vessel was out of Messrs. Summers & Payne's yard, and was sent in by the Marshal. This telegram is on the file: "Transport office has ordered me to arrange for removal of yacht from docks, wants berth, Summers & Payne who have lot of the furniture and fittings are prepared to take vessel into their yard, wire instructions whether I can arrange for removal to-morrow, transport officer provides tug. Collector, Southampton." Then the Admiralty Marshal telegraphs back: "*Germania*, allow removal to Summers & Payne's yard."]

She was put into Summers & Payne's yard on the 20th, and ever since that date Summers & Payne have been taking care of her for the Marshal. She was in their yard at the time she was seized.

[*THE PRESIDENT.* But what has become of the possessory lien? The vessel was taken away by the Marshal. If they ever had a possessory lien they gave it up.]

We still have the lien against the owner, whether the Marshal was there or not. In the ordinary case of a vessel that is arrested it does not destroy the dock owners' possessory lien, in fact, that the Marshal steps in.

[THE PRESIDENT. Not in an ordinary admiralty action.]

[*The Solicitor-General.* I may usefully here refer to a part of the Order of the Days of Grace to enemy ships, which is on p. 138 in the Manual of Emergency Legislation; it is headed "Days of Grace to Enemy Ships," and in s. 2 it says: "In the event of one of His Majesty's Principal Secretaries of State being satisfied by information reaching him not later than midnight on Friday the seventh day of August that the treatment accorded to British merchant ships and their cargoes which at the date of the outbreak of hostilities were in the ports of the enemy or which subsequently entered them, is not less favourable than the treatment accorded to enemy merchant ships by articles 3, to 7 of this Order." Articles 3 and 7 are the sections which provide for the days of grace, and on page 143 there is the notification of Sir Edward Grey to the Lords of the Admiralty saying that he has not received any notification from the German Government that they propose to extend them. In fact the days of grace have nothing to do with the case. The matter either comes or it does not come within the Hague Convention. I have shown—in fact, my learned friend has not attempted to displace my argument—that it does not in terms fall within the Hague Convention. It is no use my learned friend saying that it ought to have done so a fortiori because it was a yacht. The fact is in plain terms that this is limited to merchant vessels, and there is no suggestion that the Hague Convention has anything whatever to do with yachts. You add nothing to the matter by saying that it would have been useful if it had been done when the fact is that it actually was not, and the moment that that is conceded there is nothing more to be said about days of grace applying to yachts.]

[THE PRESIDENT. I am not sure that a serious question may not arise some day or other by reason of Germany complaining of something done in alleged violation of the Hague Convention. A contract of that kind, whether it is between individuals or between States, must be observed by both sides, and I or some one else may

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1915 have to consider whether or not Germany has so far as the Hague
THE Convention is concerned any right to complain of a violation of
GERMANIA. that instrument.]

[*The Solicitor-General.* I should strenuously contend that a Power which, as I think it would be easy to show, has violated many of its most important provisions cannot be heard in this or any other Court to contend that we are bound by the remaining provisions which it has not violated. What it comes to is this, that Mr. Bateson is dealing with a country which has detained every vessel of ours from July 30, and he is coming to ask by way of an appeal to the comity of nations that we release to them a yacht worth 45,000*l.* when they have released nothing at all to us.]

I am not asking for a release at all.

[*The Solicitor-General.* Well, that the yacht shall not be condemned.]

I am asking that Messrs. Summers & Payne should be protected.

[THE PRESIDENT. And also that the order for detention alone should remain.]

Yes, but it is for Messrs. Summers & Payne that I am seeking to get the best terms I can.

[*The Solicitor-General.* Is my learned friend abandoning now his other claim ?]

No, I appear for Baron von Bülow as far as he can do anything.

The Solicitor-General in reply. The only observation I have to make is on the alleged possessory lien of my learned friend. In reference to that I say, in the first place, that the principles stated in the judgment in *The Marie Glaeser* (1) cover the principle, even if my learned friend had established, as I do not admit that he has established, any continuity of possessory lien in favour of this firm. As far as the principle is concerned, there is no distinction to be drawn between such a case as that of a mortgagee considered and expressly dealt with in the case of *The Marie Glaeser* (1) and of a maritime lien, which was equally dealt with in the same decision. It was contended that a claim under a mortgage was in some essential respects different from that under a bottomry bond.

(1) [1914] P. 218.

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The judgment states that "It is difficult to see in what respects, so far as regards the functions of a Prize Court. It may be noted that by the municipal law of this country the claim of a mortgagee, whether in possession or not, ranks below the claims of persons who have maritime liens on the mortgaged ship, e.g., for bottomry, salvage, and wages," and authorities are cited for that proposition. "So if the mortgagees of the *Marie Glaeser* had been British subjects, and the effect of the mortgage depended on English law, *The Tobago* (1) would be an authority a fortiori against their claim. As to the contention that the mortgagees in the present case had, by virtue of the mortgage, some kind of 'property' in the *Marie Glaeser*, no information was given to the Court as to the exact meaning of the word 'property' so used, or as to its nature, or whether it imported some kind of 'ownership' of the vessel." My submission is, as to the whole of the doctrine on which judgment was given, that the right of the captor in these cases is not to be subordinated to any claim of any kind whether for necessities or for anything in the nature of a mortgage, and if I had to deal with the facts and my submission on the law is well founded, I should say that the possessory lien, if there ever was one, absolutely disappeared when the Marshal intervened, and it is shown by the documents that if there ever was such a lien, it is now no longer in existence.

I have dealt with my learned friend (Mr. Raeburn) who appears for the claims of Messrs. Ratsey & Lapthorn and Messrs. Pascall, Atkey & Son, and with regard to the claim represented by my learned friend Mr. Bateson, I submit that that ought not to prevail here. As to whether there is any part of the claim that, without admission of any liability, might be treated as a matter of indulgence, that is another matter; but if it raises a question of legal obligation, I am bound on behalf of the Crown to resist it.

[THE PRESIDENT. I have thought all along that if Mr. Bateson approached you, as Solicitor-General acting on behalf of the Crown, you might give him the 176*l.* 2*s.* 6*d.*]

The Solicitor-General. That is what I am prepared to do.

[*Mr. Bateson.* The position is this: there is 176*l.* due for the

(1) (1804) 5 C. Rob. 218; 1 Eng. P. C. 456.

1915 work done before the seizure. Since the seizure we have housed
THE and dismantled the ship.]
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The Solicitor-General. I will do this for my learned friend. It is true that this work has been done on the yacht, and to some extent we get the advantage of it. Without going into the question of liability I am prepared that the Registrar shall go into the claim of 252*l.* and the claim of 176*l.*, and, when he is satisfied that those items have really been spent, that he shall make an order for those sums.

[THE PRESIDENT. Then it is understood that the claim is limited to whatever may be allowed out of the 176*l.* and the 252*l.*]

The Solicitor-General. Yes, and my learned friend assents to that.

[*Mr. Bateson.* This is of course without prejudice to any claim I may have against anybody else—I mean this is a matter of grace on the part of the Crown.]

The Solicitor-General. Yes.

[THE PRESIDENT. It prevents any appeal against this by Messrs. Summers & Payne.]

[*Mr. Bateson.* Yes.]

[THE PRESIDENT. It does not prevent them going against their “old and esteemed customer.”]

[*Mr. Bateson.* That is what I mean—it is a mere matter of grace on the part of the Crown that they offer to give Messrs. Summers & Payne these two items.]

1915. Oct. 28. THE PRESIDENT (SIR SAMUEL EVANS). In this case the Crown asks for the condemnation of a German yacht called the *Germania*, which belonged at the outbreak of war to Herr Gustav Krupp von Bohlen, a German subject. The yacht was at Cowes at the end of July, 1914, and at the outbreak of war on August 4 it was seized by the Customs authorities on behalf of the Crown as a *droit* of admiralty. A writ was issued in prize, and a little later, on September 24, an order was made in this Court for the detention of the yacht. That was not a final order, and the present application is that that order should be extended by another order, namely, that the yacht should be condemned as enemy property.

The yacht is a racing yacht, and it clearly does not come within

the terms of the Sixth Hague Convention, which according to the preamble is a Convention dealing only with matters relating to commerce, and intended only to protect those engaged in commerce. The words used in describing the vessels to which it applies are, in the authoritative French language, “navire de commerce,” and Mr. Bateson has not suggested, and no one could suggest, that this yacht comes within those terms. Therefore it is perfectly clear that no defence can be made to the application for condemnation of the vessel on the ground of the Hague Convention. Mr. Bateson says that according to the spirit of the Hague Convention this yacht nevertheless ought not to be regarded as confiscable, and ought not to be condemned. I must deal with this matter on the ordinary law, and according to the ordinary law this vessel of a German subject, being in port at the outbreak of war, is clearly confiscable, and I condemn the yacht as belonging to an enemy subject, and as being enemy property. I condemn it as a droit of admiralty in favour of the Crown.

There was a claim here by Messrs. Summers & Payne, Limited, who had done certain work upon the yacht before seizure—that is to say, towards the end of July. Their claim amounted to about 176*l.*, and they have done other work to the yacht, and have also housed some of the fittings belonging to the yacht subsequently to seizure. By the express terms of the arrangement between them and the Marshal any sums which they were to expend upon the repairs of the yacht, or in order to keep it from deterioration, they were to expend either at their own risk or in the hope of getting payment of their expenses at some future time from the owner of the yacht. In other words, it is perfectly clear that whatever moneys were expended were not to be the foundation of any claim either against the Marshal of the Court or against the captors. So far as the housing of the yacht is concerned and the protection of the various parts of the yacht, the suggestion that this should be done came from Messrs. Summers & Payne in their letter of October 9, 1914, to the Customs authorities at Southampton: “Dear Sir, German yacht *Germania*. Will you permit us to suggest that the topmasts, rigging and blocks of this yacht, main gaff, spinaker boom and boats be brought on shore and housed with other gear which we have belonging to this yacht? *Germania* is a very high-class

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racing yacht, and if neglected will very quickly deteriorate. We already have an account against the yacht. The owner is an old and esteemed customer and we would be prepared to do this work, as we feel sure we should receive the cost from him, when, at the end of the war, matters of ownership are settled. We are, Sir, your obedient servants." Subsequently the suggestion was acceded to by the Marshal, but upon the distinct understanding that there was to be no liability on his part. Certain other sums of money were also expended. I should have been prepared to decide on legal grounds against the claim which Messrs. Summers & Payne have put forward, but I am not sorry that the advisers of the Crown have met Messrs. Summers & Payne, and that an arrangement has been made between them that a reference should be had by consent, without raising any question of obligation at all, to the Registrar to ascertain what sum ought to be allowed in respect of the claims for 176*l.* and for 252*l.* respectively, which have been sent in by Messrs. Summers & Payne. That will dispose of their claim against the captors, and against anybody connected with this Court, but of course it does not prevent them from pursuing any remedies they may have against the owner of the vessel; and I hope that at some time or other whatever money has been expended by them they may have, but so far as this Court is concerned it cannot assist them further than they will be assisted by the consent order.

I order the condemnation of the yacht as enemy property, and order it to be sold by the Marshal.

*Leave to admit an appeal within two months on behalf of owner of yacht. Security 300*l.**

By consent of the Crown, as an act of grace, a reference to the Registrar and merchants in respect of claims for repairs executed before seizure and subsequent dry-docking.

Solicitor for the Crown : *The Treasury Solicitor.*

Solicitors for claimants : *Kenneth Brown, Baker & Co. ; Lowless & Co.*

T. L. M.

IRWIN AND ANOTHER v. CARUTH AND OTHERS.

[1915 I. 164.]

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Dec. 15.

*Probate—Practice—Grant in Ireland to Irish Executor—English Assets—
Re-sealing Irish Grant.*

Sect. 95 of the Irish Probate Act, 1857 (20 & 21 Vict. c. 79), which enables an Irish grant to be resealed in England, does not take away the power of the English Court to grant probate or letters of administration in cases where the Irish grant has not in fact been resealed.

THE plaintiffs, as residuary legatees under the will, dated April 24, 1914, of William Martin Millar, claimed to have the said will established and to have a grant to them of letters of administration to the estate of the deceased with the said will annexed, denying that the defendant Caruth was executor according to the tenor.

The first-named defendant, Norman Cardukes Caruth, denied that the plaintiffs were residuary legatees under the will, and asserted that he was executor according to the tenor of the said will.

The other defendants, as the only living next of kin of the deceased, put the plaintiffs to proof of due execution, alleging that the will disposed only of property in India, and that, except as to that property, there was an intestacy; and they counterclaimed for a grant to them of letters of administration.

William Martin Millar, the deceased, was a major in the Army Veterinary Corps and died in India on April 25, 1914.

On July 3, 1914, probate was granted to the plaintiffs in the Court of the Judicial Commissioner of Oudh, and was expressly stated to have effect "over all the property of the deceased throughout the whole of British India."

On November 23, 1914, a judge of the King's Bench Division in Ireland, sitting in probate, on the motion of counsel for the defendant Caruth, ordered that "the said Norman C. Caruth be at liberty to apply for probate of the [said] will as executor for Ireland according to the tenour of the said will."

On December 7, 1914, the defendant Caruth obtained in Ireland a general grant of probate of the will, on the suggestion that he was executor according to the tenor.

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On January 15, 1915, an originating summons in the Chancery Division in Ireland was issued on the application of N. C. Caruth, claiming to be "the executor of the will" . . . for the administration of the real and personal property of the deceased.

The writ in the present action was issued on January 26, 1915, and was subsequently "issued pursuant to order of the judge dated 6th February, 1915," for service in Ireland.

Steps had been taken, and were still pending in the Irish Court, to call in the Irish grant as wrong in form, being in fact a general grant, while the order was said to have been for a limited grant only.

The deceased was said to have left personal estate in India and in England, and both real and personal estate in Ireland.

The only question calling for report was as to the effect on the application for a grant here of the grant already made in Ireland, having regard to the statute 20 & 21 Vict. c. 79, s. 95. (1)

Bayford, for the plaintiffs.

J. H. Murphy, for the defendant Caruth.

R. J. Willis, for the other defendants.

HORRIDGE J., in giving judgment for the plaintiffs (after dealing with other matters which do not call for a report), said : I do not think that the section of the Act which enables an Irish probate to be resealed in England takes away the power of this Court to grant probate or letters of administration with the will annexed where, as in this case, there has been no resealing.

Solicitors for plaintiffs : *Robinson, Wilkins & Thacker*.

Solicitors for defendant Caruth : *Nicholl, Manisty & Co*.

Solicitors for other defendants : *Roy & Cartwright*.

(1) The Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95, is as follows : " When any probate or letters of administration . . . granted by the Court of Probate in Ireland shall be produced to and a copy thereof deposited with the registrars of the Court of Probate

in England, such probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England."

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LIPMAN v. LIPMAN.

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Dec. 9.

Divorce—Practice—Deed of Separation—Covenant not to institute Proceedings—Petition for Dissolution of Marriage—Cruelty alleged before Date of Deed—Decree of Judicial Separation on Ground of subsequent Adultery.

A husband and wife separated under a deed after (as subsequently proved) cruelty on his part. The deed contained (inter alia) a clause that no proceedings should be instituted relating to the relationship of husband and wife, and it also contained a proviso that if the marriage should be dissolved, or if the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, all the covenants and provisions thereof should be void.

The husband subsequently committed adultery, and the wife petitioned for dissolution of the marriage :—

Held, that, although the deed was not set up by the husband (the suit being undefended), the Court should take cognizance of its contents, and that the petitioner was therefore not entitled to a decree of dissolution of marriage upon her present petition ; but, inasmuch as the decree of judicial separation, which the Court now pronounced on the ground of adultery, put an end to the deed, by reason of the proviso therein contained, the petitioner would, on a subsequent petition, be entitled to have her marriage dissolved on the ground of that adultery coupled with the antecedent cruelty.

Dowling v. Dowling [1898] P. 228 and *Bourne v. Bourne* [1913] P. 164 not followed.

THIS was a suit by the wife for dissolution of marriage on the grounds of cruelty and adultery.

The parties were married in February, 1908, and separated in August, 1908.

The deed of separation, which was dated August 15, 1908, contained the following covenant : “ Neither of them ” (the husband and wife) “ shall require or compel or endeavour to compel the other of them to cohabit or dwell with him or her by any legal proceedings for restitution of conjugal rights or otherwise, or institute or bring or cause to be instituted or brought any proceedings of any kind whatsoever in any Court of law against the other in any way relating to the relationship between them of husband and wife.”

The final clause of the deed was as follows : “ Provided always and it is hereby agreed and declared that if the said (husband and

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wife) shall be reconciled and return to cohabitation or if the marriage shall be dissolved or the parties shall be judicially separated by reason of any misconduct occurring after the date hereof, then and in any of such cases all the covenants and provisions hereinbefore contained shall become void and of none effect, but without prejudice to any act previously made or done hereunder or any pledges on the part of either of the parties hereto in respect of any then antecedent breach of any of the covenants or provisions herein contained."

The present petition, which was filed by the wife in September, 1915, alleged cruelty before the date of the deed and adultery since the date of the deed, i.e., "for about the last four years."

W. H. Cartwright Sharp (for *M. N. Drucquer*, now serving with His Majesty's Forces), for the petitioner. The adultery entitles the petitioner to a judicial separation, which renders the deed void, and the Court ought not to require her to bring a second suit, but should pronounce a decree nisi at once : *Dowling v. Dowling* (1) ; *Bourne v. Bourne*. (2)

HORRIDGE J. said that he did not see his way to take the short cut which counsel for the petitioner invited him to take.

The case of *Kennedy v. Kennedy* (3) showed that covenants in a deed of separation could not be ignored by the Court merely because neither party thought fit to set up the deed. In *Bourne v. Bourne* (2) the decision in *Kennedy v. Kennedy* (3) was not referred to, although it practically overruled *Dowling v. Dowling*. (1)

Bargrave Deane J., whom he had consulted, informed him that he had never taken the short course which counsel suggested.

There would be a decree of judicial separation on the ground of the husband's adultery.

This would render the deed void, and the way would be open for the petitioner to obtain the full measure of relief by means of a fresh petition, founded upon the adultery now proved, coupled with any cruelty then proved to have taken place antecedent to the date of the deed.

Solicitor : *J. N. Nabarro*.

(1) [1898] P. 228.

(2) [1913] P. 164.

(3) [1907] P. 49.

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THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
 ADMIRALTY.

(IN PRIZE.)

THE ZAMORA.

[1915 No. 538.]

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June 10, 14,
 21.

Prize Court—Neutral Cargo—Contraband—Requisition before Condemnation—Prize Court Rules, Order XXIX.—Jus Angariae.

A neutral vessel carrying 400 tons of copper from New York to Stockholm was stopped on the high seas by a British cruiser, a prize crew put on board, and the vessel ordered to Barrow to discharge. A writ having been issued in prize, the Procurator-General, acting for the War Department, applied on behalf of the Crown to requisition the part cargo of contraband. On objection taken by the neutral owners of the copper that the proceedings were not in conformity with the law of nations :—

Held, that the proposed interlocutory order could be made under the inherent powers of the Prize Court, without infringing any rule of the law of nations, as well as under the powers conferred by the Order in Council under which Order XXIX. of the Prize Court Rules had been made.

Held, further, that the claimants were not entitled to have the property retained in specie until condemned, but would have the proceeds of sale, together with damages and costs (if any), should it turn out that the part cargo in question was not confiscable.

The nature of the right of angary, obsolete so far as it rested on the Royal prerogative, discussed.

SUMMONS adjourned into Court, at the instance of the claimants, for argument in respect of the power of the Crown to requisition neutral property.

The summons was issued on the application of the Procurator-General that the War Department be at liberty to requisition on behalf of His Majesty 400 tons of copper marked B.E.R. ex ship *Zamora* in accordance with the provisions of Order XXIX., r. 5, of the Prize Court Rules, as altered by Order in Council of April 29, 1915. (1)

(1) “ Where it is made to appear that it is desired to requisition on the judge on the application of behalf of His Majesty a ship in the proper officer of the Crown respect of which no final decree of

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The *Zamora* is a Swedish steamship. She sailed from New York on March 20, 1915, for Stockholm with 400 tons of copper (contraband, and the subject of the present application), the rest of the cargo consisting of grain. The copper was shipped by the American Smelting and Refining Company, and was consigned to the Swedish Trading Company, of Stockholm, in whom it was alleged the property in the copper was vested. On April 8 the vessel was stopped between the Faroes and Shetland Isles by a British cruiser. A prize crew was put on board with orders to proceed to Kirkwall, where she arrived on April 9, and whence she was ordered to Barrow to discharge. A writ was issued on May 14, 1915, claiming condemnation on the ground that the cargo was, as to more than half of it, contraband, and, in the alternative, asking for an order for the detention and/or for the sale of the cargo because the ship had sailed (words added under the, so called, Order of Reprisals) "from a port other than a German port after March 1, 1915, having on board a cargo which had an enemy destination or was enemy property." An appearance was entered to the writ; but no adjudication had been made in the Prize Court upon it.

1915. June 10. *The Attorney-General (Sir Edward Carson)* and *G. A. H. Branson*, for the Crown. The present application is under the rule made by an Order in Council in pursuance of s. 3 of the Prize Courts Act, 1894. The rule substitutes the new Order xxix. for the old Order in existence at the time *The Antares* (1) was decided, when the Court held that the word "ship" included cargo.

The affidavit filed by the Director of Army Contracts states that "It is desired to requisition on behalf of His Majesty part of the cargo ex the s.s. *Zamora*, namely, 400 tons of copper. It is desired therefore that it may be ordered that the said copper may be appraised and released and delivered to the Crown.

condemnation has been made, he shall order that the ship shall be appraised, and that upon an undertaking being given in accordance with rule 5 of this Order the ship shall be released and delivered to the Crown."

Rule 5: "In every case of requisition under this Order an undertaking in writing shall be filed by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship"

(1) (1915) 31 Times L. R. 290.

... I am informed and believe that no final decree has yet been made for the detention or confiscation of the said copper although a writ asking for condemnation has been issued in this case."

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It is submitted that the Crown would be able, as an executive act for the defence of the realm, to requisition and take the property ; but the copper being in possession of the Court this application is made, and the form of order asked for is really a concession to the owners of the cargo, for it will serve to secure for them the value of the property in the event of its turning out that it was not contraband.

Leslie Scott, K.C., Adair Roche, K.C., R. H. Balloch, and Dr. Baty, for the claimants, subjects of a neutral State, and consignees and owners of the part cargo in question. There is no dispute about the facts, except perhaps on the question of destination, and the question of contraband will have to be decided hereafter ; for the present the question raised by the summons turns on these goods being owned by a neutral.

According to the affidavit of one of the managing directors of the Swedish Trading Company, that company purchased on September 26, 1914, from the American Smelting and Refining Company a quantity of copper for shipment in specified lots during the following months, and in March last the 400 tons now in question were shipped, and subsequently seized by the English authorities. The export from Sweden of copper was forbidden before the date of shipment on the *Zamora*.

On behalf of the Crown the Attorney-General contends that the existing Order—which may be styled the Compulsory Purchase Order—gives this Court the power to make a judicial order transferring neutral property to the Crown by way of compulsory purchase ; but, if so, it would constitute a change in the substantive law of this Court regulating the rights of neutrals to their property on the high seas, and the contention that the substantive law administered by this Court can be changed by the Royal prerogative is an erroneous proposition of constitutional law ; or our contention may be put thus : that an Act of Parliament—the Act of 1894—authorizing the making of rules in relation to practice and procedure does not authorize the making of changes in the substantive law ; see

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Cookney v. Anderson (1), *Attorney-General v. Sillem* (2), and *Poyser v. Minors*. (3) Or, again, our proposition may be stated in this form: that the system of law—the law of nations—administered, as its common law, by this Court does not recognize any such right of compulsory purchase of neutral property, as contended for on behalf of the Crown, though it is not disputed that a statute of the realm is binding on this Court even if it be an infringement of the law of nations. See as to the practice and procedure of the Prize Court the letter of 1794 of Sir William Scott and Sir John Nicholl to Mr. Jay, in Story's *Principles and Practice of Prize Courts*, p. 2; see also *The Maria* (4) and *The Recovery*. (5)

The special enabling cases covered by ss. 33 and 38 of the Prize Court Act, and No. 5 of the Hague Conventions, art. 19, relating to rolling stock only, show that there is no recognition of any general right of requisitioning. The same is to be said with respect to the old right of angary, by which was meant the power of a belligerent prince to utilize neutral ships in his harbour on the outbreak of war for the purpose of transporting his soldiers and material on payment of freight. There can be no doubt as to the inference to be drawn from the silence of the Powers in all the Hague Conventions in respect of this alleged right: see art. 29 of the Declaration of London, dealing with one specific case in which requisition is permitted, and the report of the drafting committee of that Declaration, showing that the rule of international law is that neutral property cannot be requisitioned. The text-book writers on international law, dealing with the right of angary (*jus angariae*), may be grouped into those regarding the doctrine as confined to vessels or vehicles, and those extending it somewhat further, but in the result the only rights really recognized are those essentially executive rights for temporarily requisitioning ships, and the acts of urgent military necessity practised in the field, and it is important to observe that not a single writer assumes that the right of angary covers a case like the present where it is not pretended that there is any necessity, the affidavit in

(1) (1863) 1 D. J. & S. 365.

(2) (1864) 10 H. L. C. 704.

(3) (1881) 7 Q. B. D. 329, at p. 333.

(4) (1799) 1 C. Rob. 340, at p. 349a.

(5) (1807) 6 C. Rob. 341, at p. 348.

support of the summons now before the Court not alleging any necessity at all: see Phillimore's *International Law* in the chapter on Embargo, 3rd ed., vol. 3, s. 29, p. 49. He regards the right as one arising out of urgent military necessity, and as limited to ships; see also Wheaton's *International Law* by Dana (1866), English 8th ed., s. 293, p. 466; Westlake's *International Law*, 2nd ed. (1913), part ii., War, p. 134; Lawrence's *International Law*, 4th ed. (1911), p. 620, showing that the whole trend of recent international action is to treat the wholesale embargo on neutral shipping as obsolete. Amongst purely American authorities see Halleck (1908 ed.), vol. 1, p. 519; Taylor (1902 ed.), p. 701. As to French authorities see Hautefeuille, vol. 4, p. 439; Calvo, vol. 3, s. 1277; Heffter, 4th ed., p. 357. By Risley (1897 ed.), p. 139, the doctrine is not viewed with much favour.

The chief authority for a wider view is Oppenheim, 2nd ed., vol. 2, p. 446, who says that many writers assert that the right is not obsolete, but he alleges that modern angary consists in the right of belligerents to make use of or destroy, in case of necessity for offence and defence, neutral property on their own or on enemy territory or on the open sea, provided the articles concerned are serviceable to military ends and wants, in every case the neutral owner being fully indemnified. This statement, it is submitted, is much too wide and is unsupported by any of the authorities.

Hall, 6th ed., part iv., chap. xi., p. 740, puts it that the persons and property of neutral individuals in a belligerent State are in principle subject to such exceptional measures of jurisdiction, taxation, and seizure as the existence of hostilities may render necessary, provided no further burden is placed upon foreigners than is imposed upon subjects; but he adds "The right to use or even, when necessary, to destroy neutral property within a belligerent State is, however, recognized by writers under the name of the right of angary," and he quotes varying opinions of several writers.

Davis, an American writer (*Elements of International Law*, 1908 ed., p. 439), states that the right of angary is still recognized as a lawful restraint upon commerce, and in some respects resembles the right of embargo, the neutral owner being compensated, and in its application to international telegraphs and telephones, to the rolling stock of railways, and other neutral property bids

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fair to come into especial prominence in the wars of the future ; but the work seems of little authority.

Professor Holland (Letters on War and Neutrality, at p. 136, and Laws of War, at p. 68) says that property can only be taken possession of on two conditions—(1.) when found on territory which is the scene of hostilities, and (2.) where military and strategic reasons make it necessary. Pitt-Cobbett (vol. 2, pp. 260, 261) refers to the *jus angariae* as practically obsolete in its original form as a Royal prerogative, but a recognized custom of war, when resting on military necessity, provided the neutral property, temporarily within the power of the belligerent, used or destroyed by the belligerent, was required by the necessities of war and is subject to the payment of a proper indemnity.

See also the translation of a passage on the right of angary in a Swedish work (The Laws of War) by Rikard Kleen of Stockholm (1909), p. 724 : “ After Louis XIV. one does not find the custom any longer approved in treaties. On the contrary, the custom is disapproved explicitly in many of them. Oddly enough and to the astonishment and indignation of the world it was repeated as late as during the war of 1870, railway materials owned by a Swiss company being seized in Alsace by the German military authorities to be used for military purposes, and English ships being sunk at Duclair by the Germans for blockading of the Seine against French gunboats. But these misconducts created such a storm of indignation, and were protested against so sharply in the whole literature of international law, that they have caused more likely the death than the revival of the angary. . . . It is true . . . that the Conference of 1907 at the Hague to a certain extent has departed from the general principle of disapproval of the angary, as according to the Convention No. 5, art. 19, a belligerent is entitled in exceptional cases of *urgent necessity* to requisition and use railway material on the theatre of war ; but . . . the general rule is confirmed by this exception made by voluntary agreement under condition of re-delivery and compensation . . . ”

To sum up, it may be said that the result of an examination of the authorities is to show that, in the origin, the *jus angariae* was limited to ships necessary for transport purposes, the ships being within the jurisdiction of the belligerent Power, and the military necessity

of taking neutral property or destroying neutral property in the field has been treated as analogous to the original *jus angariae* ; but there is no general right known to the law of nations by which a belligerent can exercise a power of compulsory purchase over the property of neutrals even in his own belligerent territory, or in the other belligerent territory, or on the high seas.

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It would seem that the present application on behalf of the Crown really is that goods seized on the high seas under an allegation, which may be proved or disproved, that they are contraband of war, should be brought within the jurisdiction of the Court, and then, without colour or pretence or evidence that they are urgently required, or under any military necessity, the Crown, having brought them within the jurisdiction of this Court for one purpose, namely, for the purpose of trying to prove that they are contraband, should have the right not merely to apply to the Court for an order from the Court that these goods be requisitioned, but that the Court should not have a word to say as to whether they are rightly or wrongly requisitioned.

It is further submitted that the old practice of pre-emption, as known to the Prize Court, has nothing to do with this case, which is the first in the history of prize jurisdiction in England where it has been suggested that the Crown has the right to requisition the property of a neutral subject of a neutral State on the high seas.

What the neutral wants is the goods ; but in these proceedings, if successful, they will pass irrevocably, and all he will get is a sum of money, which is not what he wants.

The Attorney-General in reply. The nature and effect of the decisions of the Prize Court of the captor's country are elaborately set out in Wheaton's *International Law*, 8th ed., p. 490, ss. 392—396, and it will be found that the decisions of the Court in relation to Orders in Council have never shown any tendency, on the part of the Court, to refuse to conform to them ; but for present purposes it is not necessary to put the matter higher than this, that we ask the Court to accept the order as *prima facie* right until the contrary is shown : *The Invincible*. (1)

(1) (1814) 2 Gall. 39, at p. 43.

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June 14. At the conclusion of the arguments, the learned President stated that he was clearly of opinion that he had jurisdiction to deal with the application of the Procurator-General, and (reserving his statement of reasons to a subsequent date) the learned judge accordingly made an order that, after being appraised, the 400 tons of copper should be released and delivered to the Crown, upon an undertaking being given in accordance with r. 5 of Order XXIX. of the Prize Court Rules.

On June 21 the learned judge delivered the following written judgment :—

THE PRESIDENT (SIR SAMUEL EVANS). By a summons issued in an action in prize relating to the steamship *Zamora* and her cargo, an application was made by the Procurator-General for an interlocutory order that part of the cargo laden in the vessel, namely, about 400 tons of copper, should be released and delivered up to the Crown under Order XXIX. of the Prize Court Rules, upon an undertaking to be given by the proper officer of the Crown to pay into Court the appraised value of the copper in accordance with r. 5 of the Order. The claim in the writ in the prize proceedings was “for a decree that the said steamship *Zamora* be condemned and confiscated as good and lawful prize on the ground that the cargo which she was carrying at the time of her capture and seizure was as to more than one-half thereof contraband of war, and for a decree that the said cargo be condemned as good and lawful prize as contraband of war ; or in the alternative for an order for the detention and/or for the sale of the said cargo on the ground that the said steamship sailed from a port other than a German port after March 1, 1915, having on board the said cargo, which had an enemy destination or was enemy property.”

The *Zamora* was a Swedish vessel registered of Stockholm. She sailed from New York, United States of America, on March 20, 1915, bound for Stockholm. On April 8, when between the Faroes and the Shetlands, she was stopped and captured by H.M.S. *Alsatian*, and a prize crew was put on board. She was taken to the Orkney Islands and was, with the cargo, finally handed over to the marshal of this Court on April 19. Thenceforth the ship and cargo remained in the custody of the marshal of the Prize Court awaiting the hearing

of the cause upon the judgment in which their condemnation or release depended.

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In support of the present application for the release and delivery of the cargo to the Crown, a sufficient affidavit of the Director of Army Contracts was filed. The application was strenuously resisted on behalf of a Swedish firm who claim to be the owners of the cargo.

The summons came before me in chambers, and, at the request of counsel for the claimants, I ordered that it be adjourned into Court for argument. Upon the hearing it was contended that the provisions of Order XXIX. material to the present question violated the law of nations, were not binding upon this Court, and that this Court owed no obedience to them, and ought not to act under them. The argument spread over a wide field. In the expanse of the outlook, the matter really in issue was so dwarfed as to vanish almost out of sight. Before entering upon a survey of the extended area which was opened out in the argument, I propose to deal with the more restricted position in relation to which the decision of the question in issue depends.

The position is that prize proceedings resulting from the capture of the vessel and cargo are pending ; and that the present application is for an interlocutory order in respect of the copper which was part of the captured property. Any order made upon the interlocutory application will not prejudice the case for the claimants upon the final hearing. It may be that their cargo will be decided to be confiscable and will be decreed to be condemned ; or it may happen, on the other hand, that the decision will be the other way, in which case the claimants will have the value of the cargo decreed to be paid to them, and, possibly, in addition they may be awarded sums for damages and costs. The order made upon the present application will not affect their rights, which will fall to be determined at the hearing of the cause. At the outset the capture or seizure as prize vests the possession of the property captured or seized in the Crown, and when the property comes into the custody of the marshal of this Court, it is subjected fully to the jurisdiction of this Court.

The Court has inherent powers to deal with the property brought within its jurisdiction as it may deem fit in the exercise of its discretion.

It has, in my opinion, such a power, apart from any rules of

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practice made under the Prize Acts of 1864 or 1894. It could, without any such rules, order a sale of perishable goods before condemnation ; or order a sale of goods in order to avoid difficulties or expense of warehousing, or removing, or for any other reason which appeared sufficient to the Court.

In my view, persons who lay claim to property captured or seized have no right by any rule of international law to demand that the property should be preserved in specie until the final decree determines whether it is to be released or to be condemned. Prize Courts have always acted upon the principle that the capture is lawful, until claimants establish the contrary. All that it is necessary for captors to allege in prize proceedings is that the capture was made and that the property captured is claimed as prize ; thereupon claimants must establish their claim to release. If their claim to release is sustained they may have the property delivered up, if it has been kept intact ; or they will receive its value if it has been sold or otherwise disposed of, with or without costs and damages against the captors, as the circumstances may require.

The argument of counsel for the claimants was, or necessarily involved, that the goods captured must, in any circumstances, be preserved to be delivered up in the same character, if release is ordered, and that they cannot, except with the consent of the claimants, be sold, or converted into a fund ; or, in other words, that the claimants, in case their claim is allowed, must be put in possession of the property itself, and not of its value.

I know of no principle or rule of international law to that effect. If the claimants have no such legal right to have the property delivered up in specie, it matters not whether the property is sold for good reasons, and so converted into money, or is requisitioned by the Crown (instead of going through the form of sale) upon an undertaking to pay into Court the appraised value. But apart from any inherent power of the Court, the Order referred to in the Prize Court Rules (Order xxix.) deals expressly with the matter, and prescribes the practice to be pursued. I will consider hereafter the large question whether this Order violates an acknowledged and settled principle of the law of nations ; and whether, if it does, it nevertheless, as an Order made by His Majesty in Council, must be observed and obeyed by this Court.

Before approaching that wide and important subject I must declare that, in my view, Order XXIX. deals only with a matter affecting the procedure and practice of the Court—a domestic affair in which no foreigner, neutral or enemy, has any voice or right to interfere. It deals only with interlocutory steps which may be taken in this Court after prize proceedings have been instituted. Matters of practice in proceedings, such as sale of property, or delivery up on bail, or upon appraisement, are not of international concern; and are not, and cannot be, regulated by uniform international principles or procedure to be applied in the Courts of all countries. As an example, a reference to the Prize Regulations of Russia and of Japan during the war of 1904 will show that they differ as to the rules regulating the sale of captured vessels and goods before or after the institution of prize proceedings.

If Order XXIX. deals, as I think it does, merely with the regulation of the practice and procedure of this Prize Court, it has the force of an Act of Parliament, as it has been made under statutory powers. But if it goes beyond procedure and practice, it has nevertheless the force properly attributable to an Order in Council. This appears by the Order itself; and in the Naval Prize Act, 1864, there is an express saving of the right, power, or prerogative of the Crown, as there is also of the jurisdiction or authority of or exercisable by the Prize Court. If it is regarded as an Order in Council, it is in my opinion within the power and prerogative of the Crown to make an order giving the right to requisition neutral property which may be of use to the Crown as a belligerent, subject to making compensation therefor. For instance, where in former wars such things as planks, sailcloths, pitch, hemp, and copper sheets belonging to neutrals were ordered before condemnation to be handed over to the Government pursuant to an order or declaration of the Crown (see the following cases gathered from Hay and Marriott's Reports (1801): *The Vrow Antoinette*, p. 142; *De Jonge Joslers*, p. 148; *Concordia Affinitatis*, p. 169; *Sarah and Bernhardus*, p. 174; *The Hoppet*, p. 217; *Jonge Gertruyda*, p. 246; *Concordia Sophia*, p. 267; *Drie Gebroeders*, p. 270; *The Jonge Juffers*, p. 272, and also the cases mentioned at pp. 287—8). As to the law relating to foodstuffs, reference may be made to *The Haabet*. (1) Lord Stowell there deals with this question

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(1) (1800) 2 C. Rob. 174, at p. 182.

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as follows: "The right of taking possession of cargoes of this description, commeatus, or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven, by his necessities, to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification, and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorized exercises of the rights of war."

As to interlocutory orders, dealing with seized cargoes in prize proceedings, from early times in this country up to more recent times in the United States of America, numbers of instances will be

found of orders for sale before condemnation, and also for delivery to the State of goods not already condemned upon their value being paid into Court or secured ; in some cases, where on the final hearing it was decided that the goods were not confiscable, and in some, even before legal proceedings in prize had been commenced.

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As it was contended that to give effect to Order xxix. by allowing the State to requisition would be to act in violation of the law of nations, it would appear to be more useful for the purpose of inducing conviction to extract instances from the practice of other countries. Accordingly I will refer to some cases from the United States of America, the Courts of which, next possibly to our own, have done most for the elucidation and development of the law of nations applicable to the law of prize.

In *The St. Lawrence and Cargo* (1), Story J. states that in that case the property was sold under an interlocutory order before final condemnation, and the proceeds were brought into the registry to abide the final decision of the Appellate Court.

In *The Avery and Cargo* (2) the same learned judge dealt on appeal with an application by the captors relating to the proceeds of sale of goods made under an interlocutory order pending the proceedings in the Court below (whereof restoration was afterwards decreed), and in the course of his judgment he said : “ It is very clear that the terms of this Act ” (cited) “ apply only to sales after a final condemnation, and not to sales made pendente lite under interlocutory decrees of court. . . . Interlocutory sales are often ordered under a perishable monition and survey ; or for other good cause in the discretion of the Court.”

I will cite a few later instances decided in 1862-3 which arose during the American Civil War.

In *The Sarah and Caroline and Cargo* (3) a neutral vessel was captured on the ground that she was trying to break a blockade. The cargo was sold before condemnation, as appears from the following passage in the judgment of Betts J. : “ No appearance having been entered in the suit on due return of the warrant of arrest of the cargo, and the capture having vested jurisdiction in the Prize Court over the property seized, it is ordered that an

(1) (1814) 2 Gall. 19, at p. 22.

(3) (1862) Blatchford, Pr. Cases,

(2) (1814) 2 Gall. 308.

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interlocutory order for the sale of the cargo arrested in the cause be made, and that the proceeds thereof be deposited in the cause in the registry of the Court to abide the further order of the Court."

Another significant case, where the vessel and cargo were delivered over to the public use by order made even before the libel in prize was filed and without notice to any claimant, was the steamer *Memphis and Cargo*. (1) The vessel was British, and the cargo also belonged to British subjects. The head-note is as follows: "This vessel having been sent in to the Court as a prize, the Court, on the application of the district attorney, *before libel filed*, and before any appearance by any claimant, and without notice to any claimant, made an order appointing appraisers to value the prize, *with the view to her being taken for the use of the Government*. After the libel was filed the claimant appeared in the suit, and moved to vacate the order because it was made without notice to him. Held, that the motion could *not* be granted. Property captured as prize is under the control of the Court from the time it is delivered to the Court by the prize-master until it is finally disposed of, and the filing of a libel is not necessary to give the Court cognizance of the property."

I may observe that the order for appraisement and delivery embraced the cargo as well as the ship. I will cite one passage from the judgment (2), as it appears to me to be important: "The point most strenuously urged by the several counsel was that the Prize Court acquires no cognizance of a prize case except by means of a libel, which causes an arrest, in law, of the property captured, and subjects it thereafter to judicial jurisdiction. This, it appears to me, is a manifest misapprehension of the state of the matter under the jurisprudence of the United States. The prize vessel and all her cargo and papers are, in the first instance, transmitted by the officer making the capture to the charge of the judge of the district to which such prize is ordered to proceed (2 U. S. Stat. at Large, art. 7). The standing prize rules, fully confirmed by the Act of Congress 'relative to judicial proceedings upon captured property and the administration of the law of prize,' approved March 25, 1862, place the property captured under the control of the

(1) (1862) Blatchford, Pr. Cases, 202.

(2) Ibid. at pp. 203, 204.

Court and its officers, until the final adjudication and disposal of it by the Court. The notion, therefore, that the prerogative powers of the Government can be exercised only directly by the United States in its military capacity, and not at all through the Courts, cannot be supported under our laws. Those high functions are legitimately put in force by the instrumentality of the judiciary, in obtaining, through its agency, the active use of the possession of prize property, which first vests in that department. Accordingly, an order for the appraisal of captured property, and the surrender or transfer of it to governmental uses, under precautionary provisions to secure individual interests vesting in it, is palpably a judicial power, to be performed at the instance of the Government, and need not, if indeed it can, be superseded or dispensed with by a direct and summary act of appropriation of the property by the Executive authority."

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In the case of the steamer *Ella Warley and Cargo* (1) the method to be adopted for ascertaining the value of property handed over to the use of the captors was the matter chiefly discussed; but in the judgment Betts J. dealt with the right of the captors thus: "The prerogative right of the captors to take the property seized to their own use is modified only in subserviency to the modern law of war, that, in case a judicial confiscation of it is not secured, the captors are responsible over for its value to the lawful proprietor. That responsibility may be secured to the claimant by bail in Court for its worth, or other equivalent protection to such contingent right. The usage of this Court is to place the value in deposit in the registry of the Court . . . to be restored and paid to the claimant in case of the acquittal of the property, in place of relying upon individual undertakings or responsibilities therefor"; and he proceeds (2): "But all the decisions must rest on the same principle—that it is competent to the Government, through the agency of the Courts, to take immediate possession and use of captured property, on guaranteeing by bail or deposit, at its worth, the restoration of its value to its lawful claimants."

At a later stage, in dealing with the same vessel and her cargo, the learned judge said: "I retain the conviction that the Government possesses the legal right of claiming a direct appropriation to public

(1) (1862) Blatchford, Pr. Cases, 204.

(2) Ibid. at p. 206.

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use of captured property, and that the Courts are bound to carry such demand into execution, according to the usual course of procedure before it": see *The Ella Warley and Cargo*. (1)

The cases of *The Memphis* (2) and *The Ella Warley* (3) afterwards came on appeal before Nelson J., Associate Justice of the Supreme Court of the United States, who was no mean authority upon questions of prize law, and none of the principles enunciated by Betts J. in those cases were disapproved.

Finally, I would refer to the case of the schooner *Stephen Hart and Cargo*. (4) The case was finally determined on July 30, 1863: meantime, by interlocutory orders, some made before the libel in prize, and others after proceedings were taken, but all made before final decree, parts of the cargo were delivered to the Navy Department for the use of the United States; other parts to the War Department, the Ordnance Department, and the Sanitary Department of the States; and the schooner herself and the remainder of her cargo were sold by public auction; and all the proceeds of the vessel and her cargo delivered and sold as aforesaid were paid into the registry of the Court, to await the final determination and decree of the Court.

In view of the cases to which reference has now been made, it cannot, in my opinion, be possible to maintain that the requisition by the State of captured property which is provided for by Order XXIX. of the Prize Court Rules is a violation of an acknowledged or settled principle or rule of the law of nations.

If the view just expressed is correct, it is not necessary to discuss the question whether this Court is bound to obey an Order in Council which may run contrary to the acknowledged law of nations. If that question should arise, I am humbly and fully content to assume the standpoint of Lord Stowell in the case of *The Fox* (5), in which he had to deal with the Orders in Council which were made by way of reprisal after the celebrated Berlin and Milan decrees of Napoleon. He expressed his view of the duty of the Prize Court with reference to the law of nations, and to Orders in Council by the State in

(1) Blatchford, Pr. Cases, at p. 209. (3) Blatchford, Pr. Cases, 204.
(2) Blatchford, Pr. Cases, 202. 387. (4) (1863) Blatchford, Pr. Cases,
(5) (1811) Edw. 312, 314.

and under which the Court exercised jurisdiction, in the following classical passages :—

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“In the course of the discussion a question has been started, What would be the duty of the Court under Orders in Council that were repugnant to the law of nations ? It has been contended on one side, that the Court would at all events be bound to enforce the Orders in Council ; on the other, that the Court would be bound to apply the rule of the law of nations adapted to the particular case in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the law of nations, however liable to be so described if merely original and abstract. And, therefore, it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its Government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of its decisions, and collected from the common usage of civilised States. At the same time it is strictly true that, by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce ; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King’s Orders in Council, are not at all inconsistent with each other, because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them ; cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself ; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

“The constitution of this Court, relatively to the legislative power

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of the King in Council, is analogous to that of the Courts of common law relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice ; they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculations. What would be the duty of the individuals who preside in those Courts, if required to enforce an Act of Parliament, which contradicted those principles, is a question which I presume they would not entertain a priori, because they will not entertain a priori the supposition that any such will arise. In like manner this Court will not let itself loose into speculations, as to what would be its duty under such an emergency ; because it cannot, without extreme indecency, presume that any such emergency will happen ; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. In the particular case of the orders and instructions which give rise to the present question, the Court has not heard it at all maintained in argument that, as *retaliatory* orders, they are not conformable to such principles ; for *retaliatory* orders they are. They are so declared in their own language, and in the uniform language of the Government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory ; and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate."

Judges and jurists have pronounced upon this subject after the judgment of Lord Stowell in *The Fox*. (1)

In *Maisonnaire v. Keating* (2) Story J. expressed his view as follows : "The legality of the conduct of the captors may, under circumstances, exclusively depend upon the ordinances of their own Government. *If, for instance, the sovereign should, by a special order, authorise the capture of neutral property for a cause manifestly unfounded in the law of nations, there can be no doubt that it would*

(1) Edw. 311.

(2) (1815) 2 Gall. 325.

afford a complete justification of the captors in all tribunals of prize.

The acts of subjects, lawfully done under the orders of their sovereign, are not cognizable by foreign Courts. *If such acts be a violation of neutral rights, the only remedy lies by an appeal to the sovereign, or by a resort to arms. A capture, therefore, under the Berlin and Milan decrees, or the celebrated Orders in Council, although they might be violations of neutral rights, must still have been deemed, as to the captors, a rightful capture, and have authorised the exercise of all the usual rights of war."*

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Upon this subject, I may cite the following passage from the judgment of an American judge a generation later: "The general argument against the expediency of subjecting property to peremptory sale before condemnation or trial, must yield to the provisions of positive law": see per Best J. in *The Nassau*. (1)

Our text-writers acknowledge the binding force of Orders in Council of the State in which the Court exercises jurisdiction.

I will only cite the opinion of one of them, the late Dr. Westlake. In dealing with coast fishing vessels, he writes (2): "But if the captures were made in pursuance of a Government Order, the Prize Court, in the absence of anything to the contrary in the constitution of the country, will be bound by such an Order emanating from the authority under which it sits." And in dealing more generally with the subject, the learned and esteemed author writes (3):

"Questions of prize have always been matters of the domestic jurisdiction of the captor's country, commonly called the Admiralty jurisdiction from its original form, by whatever name the branch exercising it may be known in any modern system of procedure. It is open to all those of any nationality whose interests may be affected by its decisions, and it is the duty of its judges, a duty in which they have seldom failed in any civilized country, to do justice to them all with strict impartiality. In that sense a Court of Admiralty is an international one, but in that sense only, for the law which it administers cannot help bearing the impress of its own nationality.

(1) (1862) Blatchford, Pr. Cases, 198. (2) International Law, 2nd edit. (1913), part ii., War, p. 155.

(3) Ibid. at pp. 317, 318,

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“ A Court must take its law from the authority under which it sits, and for a Court of Admiralty that authority has never been any other than that of its own country. It must apply any rules on international questions which it finds to be generally agreed on, a condition which involves the agreement of its own country with them. Where there is no general agreement and the supreme authority of its own country has not taken a decided line, the Court must take that line which justice appears to it to require, whether favourable or not to a fellow subject being a party before it, or to what it may conceive to be the interest of its own country. But where the supreme authority under which it sits has taken a decided line, a Court of Admiralty, like any other Court, can only obey. Thus we have seen the English Parliament and Privy Council determining from time to time whether neutral goods in enemy ships should be deemed lawful prize, and the English Admiralty deciding one way in 1357, and the other way two centuries and a half afterwards. When the famous Orders in Council laid down rules as to neutral shipping for the then naval war which were certainly not justifiable otherwise than by way of retortion against the Berlin and Milan decrees, the British Admiralty did not, and could not, presume either to refuse execution to the Orders, or to exercise an independent judgment as to their justification.”

I am not called upon to declare what this Court would or ought to do in an extreme case if an Order in Council directed something to be done which was clearly repugnant to and subversive of an acknowledged principle of the law of nations.

I make bold to express the hope and belief that the nations of the world need not be apprehensive that Orders in Council will emanate from the Government of this country in such violation of the acknowledged law of nations that it is conceivable that our prize tribunals, holding the law of nations in reverence, would feel called upon to disregard and refuse obedience to the provisions of such Orders.

For the reasons, historical and other, which I have endeavoured to set forth, I am of opinion that nothing contained in the provisions of Order XXIX. of the Prize Court Rules is repugnant to international law ; and that the powers entrusted to, and to be exercised by, the Court under the Order are in accordance with the inherent powers of

the Court itself, and are well within the rights of the Crown under the statutory provisions referred to, no less than under its prerogative authority.

I therefore order the copper to be delivered up to the Crown as prayed by the summons.

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Leave to claimants to enter appeal within twenty-one days. Security 350l.

Solicitor for the Procurator-General : *The Treasury Solicitor.*

Solicitors for the claimants : *Botterell & Roche.*

T. L. M.

 IN THE ESTATE OF ROBERT MYLES HEYWOOD.

1915

Probate—Practice—Soldier's Will—Wills Act, 1837 (1 Vict. c. 26), s. 11.

 Dec. 20.

Where it appeared that the military authorities thought it undesirable that portions of a letter which included a military will should be published, the Court directed that the person applying for the grant should be at liberty to offer for probate so much only of the letter as was testamentary or necessary for the understanding of the testamentary part.

THIS was a motion for administration with certain portions only of a letter constituting a will under s. 11 of the Wills Act (1 Vict. c. 26) annexed, and for the total exclusion of the remainder of the letter.

The deceased, an officer in the Army, died on February 15, 1915, in Belgium, of wounds received in action.

Under date February 8, 1915, the deceased wrote a letter to his wife's father, which contained, inter alia, references to the wife by her Christian name, and on the last page included the following clause: "All should be ship-shape as regards my possessions. I have made no will and so all what little there is apart from the marriage settlement goes to her."

There were affidavits proving the handwriting and signature "Myles" and identifying the person referred to in that clause as "her" and, in different parts of the will, as "Barbara" with the wife of the deceased, the present applicant.

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The affidavits further showed that the military authorities had expressed the view that it was undesirable to publish the whole of the letter.

There was no issue of the marriage, and the father of the deceased, as next of kin, consented to be bound by any order the Court might make on this motion.

The estate of the deceased, consisting of personalty, was of the estimated value of 1444*l.* gross, 839*l.* net.

H. Durley Grazebrook, on behalf of the widow, Barbara Heywood, moved for an order that only the extracts from the deceased's letter, dated February 8, 1915, might be allowed to be filed and included in the grant as were set out in the affidavit of the applicant, and that the rest of the letter might be expunged from the original before it was filed for the purpose of obtaining the grant.

BARGRAVE DEANE J. Only the portion of the letter which is testamentary, together with such other words and figures (including the date) as render it intelligible, and all of which are set out in the affidavit of the applicant, should be filed. The rest of the letter should be ignored. The ordinary practice cannot be allowed to prevail over the exigencies of the public service in time of war.

Solicitors: *Chester, Broome & Griffiths.*

H. D. G.

IN THE ESTATE OF WILLIAM EDWARD ANDERSON.

1916

ANDERSON v. DOWNES.

Jan. 19, 20.

[1915 A. 292.]

Will of Soldier or Sailor—Wills Act, 1837 (1 Vict. c. 26), s. 11—Member of St. John's Ambulance Association—Letter written at Home after Order for Mobilization—Invalidity.

A member of a local corps of the St. John's Ambulance Association, being about to start from home under orders to join H.M.S. *Pembroke*, permanently stationed at Chatham, wrote out at home on the morning of his departure a document disposing of his property. He remained in barracks at Chatham and did not go on board ship till he joined a transport on August 17, 1914, and he was wrecked in her on October 30, 1914:—

Held, not within the exceptions in s. 11 of the Wills Act.

THE plaintiff, as the natural and lawful father, next of kin, and heir-at-law, claimed a grant of letters of administration of the estate of his late son, William Edward Anderson, whom the plaintiff alleged to have died intestate on or about October 30, 1914.

The defendant, Edith Eliza Priscilla Downes, denied that the deceased died intestate, and, by way of counter-claim, set up as his will a document written and signed by the deceased on August 3, 1914, alleging that at that time the deceased was a person within the provisions of s. 11 of the Wills Act (1 Vict. c. 26).

An order having been made for the substance of the case to be given, the defendant complied with the order by stating that she alleged "that at the time of the making of the said will the deceased was actively engaged in the service of the Crown on military and/or naval duties. The deceased while so engaged was drowned on or about the 30th day of October, 1914, while on board H.M. transport *Rohilla*, which was wrecked at sea on that date."

In reply, the plaintiff joined issue on the defence, and, by way of defence to the counter-claim, pleaded that the alleged will was not duly executed according to the provisions of the Wills Act (1 Vict. c. 26), s. 9, and, in the substance of the case thereunder, stated that he put the defendant to proof that the provisions of the statute had been complied with.



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The plaintiff further pleaded a denial that the said deceased was a person within the provisions of the statute 1 Vict. c. 26, s. 11 ; and he asked the Court to pronounce against the validity of the alleged will.

Evidence having been called to prove the facts stated in the head-note and the judgment, which, however, were not substantially in dispute,

Pridham Wippell (*Acton Pile* with him), for the defendant, cited *In the Goods of Hiscock* (1), *In the Goods of M'Murdo* (2), *In the Goods of Saunders* (3), *In the Goods of Donaldson* (4), *Drummond v. Parish* (5), *In the Goods of Godley* (6), *Gattward v. Knee* (7), and *In the Goods of Hale*. (8) He submitted that the forces of the Crown were now in a very different position to that which they were in, as regards their composition, when the Wills Act was passed. Among the men who left in the same batch with the deceased, some had become attached to the Army, while others had been attached to the Navy. In s. 11 the word "soldier" is generic and applies to both soldiers and sailors, and members of the St. John's Ambulance Association were both soldiers and sailors ; people of all sorts and conditions and complements or adjuncts of military or naval forces had been held to be within the terms of s. 11. The true test was whether the man had taken some step towards going on active service, or in anticipation of going on an expedition.

W. O. Willis (*Beddington* with him), for the plaintiff. The deceased was not a soldier, and he had never been at sea and was not a sailor or mariner, within the words of s. 11, at the time when he wrote out the document in question. Moreover, war had not then been declared by this country. The fact that there was then existing a state of war between other countries and that orders for mobilizing the forces of this country had been given had nothing to do with the point before the Court. The later part of the section applied to mariners or seamen at sea, whether a state of war existed

(1) [1901] P. 78.

(2) (1867) L. R. 1 P. & M. 540.

(3) (1865) L. R. 1 P. & M. 16.

(4) (1840) 2 Curt. 386.

(5) (1843) 3 Curt. 522.

(6) (1907) 41 Ir. L. T. Rep. 160.

(7) [1902] P. 99.

(8) [1915] 2 I. R. 362.

or not. The deceased never was at sea until about a fortnight after he wrote the document. [He cited *In the Goods of Corby* (1) ; *In the Goods of Lay* (2) ; *In the Goods of M'Murdo*. (3)]

Pridham Wippell in reply.

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Jan. 20. BARGRAVE DEANE J. The Wills Act (1 Vict. c. 26), s. 9, lays down the principles according to which an English will must now be made. An exception is made by s. 11, which enacts "that any soldier being in actual military service, or any mariner or sea-man being at sea, may dispose of his personal estate as he might have done before the making of this Act."

In this case, the deceased, who was unfortunately drowned some time after leaving home, was a member of a civilian association which had a branch at Barnoldswick in Yorkshire, and he became a servant of the Crown in this sense, that he was liable to be called up for active service.

On August 2, 1914, Mr. John William Thompson, the district superintendent of the St. John's Ambulance Association, received a telegraphic message mobilizing a number of men known as sick berth reservists, members of the association, who had previously volunteered for active service, and he at once gave notice to the men that they must be prepared to go on active service at short notice. On August 3, the deceased wrote, in his father's house at Barnoldswick, the document now in question. He had not then actually joined any establishment, but was under orders to be at the railway station at a certain hour. He told the defendant, Miss Downes, to whom he was engaged to be married, that he had made this document in her favour. He went off that same day to Chatham and was attached to H.M.S. *Pembroke*, which is permanently stationed at Chatham. He did not go on board of that or any other ship, but remained on shore at Chatham till he joined the *Rohilla* on August 17, 1914.

This would be a perfectly good will if made when this man was at sea.

The language of s. 11 of the Wills Act (1 Vict. c. 26) is peculiar : the words are not identical with regard to soldiers and mariners.

(1) (1854) 1 Spinks, 292.

(2) (1840) 2 Curt. 375.

(3) L. R. 1 P. & M. 540.

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 ———
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To come within the exceptions in that section, a soldier must be in actual military service, and if this deceased man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when the deceased wrote out this document he was not at sea : he was in fact at home in his father's house.

It is with the greatest regret that I feel compelled to hold that this document cannot be admitted as a will.

Various cases have been cited, and the nearest in point seems to me to be *In the Goods of Lay* (1), where the Court, in admitting the document, held that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time he wrote the document. That was referred to with approval by Sir J. P. Wilde in the case of *In the Goods of M'Murdo*. (2)

If the deceased in the present case had been at sea at any period before he wrote out the document now before me, it might have been argued, with some chance of success, that he was within the words of s. 11.

Undoubtedly the deceased intended his property to go as indicated in this document. Unfortunately he did not ask advice, and it may well be that he did not know the law.

But I cannot make the law, and I very much regret that I cannot give effect to his expressed wishes.

I must pronounce against this document, but I think that the costs of both parties should be ordered to come out of the deceased's estate—that is, out of the personalty ; I have no power to order them to be paid out of the realty.

Solicitors for plaintiff : *Radford & Frankland, for Charlesworth & Wood, Skipton.*

Solicitors for defendant : *Hamblins, Grammer & Hamlin, for Oliver Leak, Barnoldswick.*

(1) 2 Curt. 375.

(2) L. R. 1 P. & M. 540.

THE NORD.

[1915, fol. 451.]

1916

Feb. 4.

Admiralty—Compulsory Pilotage—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 603, 625—Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), ss. 14, 15—Notice to Mariners, March 27, 1915—"Conducting" Vessel.

The defendants' vessel was, at the time of a collision with the plaintiffs' vessel, being "conducted" by a pilot licensed by the London Trinity House, in accordance with the Defence of the Realm (Consolidation) Regulations, 1914. The pilot having been found alone to blame :—

Held by BARGRAVE DEANE J., that though the defendants' vessel was an exempt ship under the Merchant Shipping Act, 1894, and, therefore, the defendants could not have availed themselves of the defence of compulsory pilotage, the pilot actually "conducting" the vessel was, under the new and temporary regulations, compulsorily in charge in the sense that the defendants were not liable for his wrongful acts.

ACTION OF DAMAGE BY COLLISION.

Hearing on point of law as to compulsory pilotage.

The plaintiffs were the owners of the steamship *Levensau*, an interned German vessel registered in the name of the Lords Commissioners of the Admiralty and employed in the Admiralty coasting trade.

The defendants were the owners of the Swedish steamship *Nord*.

On July 2, 1915, a little after 1 A.M., in fine weather, the *Levensau*, a screw steamship of 2155 tons gross register with engines of 182 horse power nominal, in charge of a Trinity House pilot, was in Halfway Reach of the river Thames in the course of being moved from her anchorage off Dagenham Jetty to Erith, where she had been ordered to proceed for the purpose of discharging her cargo of coal, when she came into collision with the screw steamship *Nord*, of 2204 tons gross register, bound from a port in the Baltic (Umea) to London with a cargo of timber.

1916. Feb. 3. BARGRAVE DEANE J. found that the collision was brought about solely by the fault of the pilot of the *Nord*,

1916
 THE NORD. By par. 5 of their statement of defence the defendants alleged that "Alternatively the defendants say that if there was any negligence in the navigation of the *Nord* which is denied the same was solely that of the said pilot who was in charge of her by compulsion of law."

The question raised by counsel for the plaintiffs was reserved for further consideration—namely, that assuming the pilot of the *Nord* was compulsorily in charge and alone to blame for the collision, that did not enable the defendants to avoid liability for his negligent navigation, as, before the Pilotage Act of 1913 (2 & 3 Geo. 5, c. 31) and the Defence of the Realm (Consolidation) Regulations, 1914, the *Nord* was, under ss. 603 and 625 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), an exempt ship, and it was not the intention of the Pilotage Act, 1913, by s. 10, sub-s. 1, to increase the facilities for the owners of a wrong-doing vessel, in charge of a compulsory pilot, to escape liability, as the extension, by reason of the war, of compulsory pilotage did not include the defence, the object of the Legislature being to get rid of the defence of compulsory pilotage and adopt the Continental system by which the pilot does not supersede the master in the command of the vessel, but acts as his adviser.

Reference was made in the course of the arguments to the cases of *The Maria* (1), *The Guy Mannering* (2), and *The Augusta*. (3)

Bateson, K.C., and *D. Stephens*, for the plaintiffs.

Laing, K.C., and *C. R. Dunlop*, for the defendants.

1916. Feb. 4. BARGRAVE DEANE J. The question of compulsory pilotage was quite simple up to 1913, but in 1913 there was a movement on foot to get rid of the defence of compulsory pilotage. There was a good deal of talk about it, and a great deal appeared in the public Press about it, and various opinions were expressed as to the advisability of doing away with it. The result has been an Act of Parliament, called the Pilotage Act, 1913, which has caused much confusion.

(1) (1839) 1 W. Rob. 95.

(2) (1882) 7 P. D. 132.

(3) (1887) 6 Asp. M. L. C. 161.

It was felt that it was very difficult to alter things without proper notice, and the Act provides for certain things which are not to take effect at all till a subsequent date, and meanwhile things are to remain the same, and meanwhile also the old Act is not altogether repealed. So that we have contradictory provisions, but I do not think that interferes with my judgment in this particular case.

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In this case the question of pilotage arose in July, 1915, and the question is, what was the law applicable at that date? The whole state of things was different then, because war had broken out. It was found necessary to pass special legislation with a view of providing for quite a different state of things from that which was in force at the time of the Act of 1913; and by the Defence of the Realm Act, 1914, His Majesty the King was given power, by Order in Council, to issue any regulations he thought fit for the better carrying on of the defence of the realm; and it was enacted that His Majesty by Order in Council might direct any of his naval or military authorities, or any officer thereunder, to issue such regulations as were necessary, and if those regulations were not obeyed penalties would follow.

Among other regulations which were issued is this one to which I have had my attention called, "Notice to Mariners," dated March 27, 1915. That is before the date when this question with regard to the *Nord* and compulsory pilotage arose, and the *Nord* was subject to the regulation. The notice provides: "The following Orders as to compulsory pilotage between the Downs and Great Yarmouth made under the Defence of the Realm (Consolidation) Regulations, 1914, will come into operation at 6 A.M. on March 31, 1915, and will supersede those now in force."

Therefore here is a new regulation, having the effect of an Act of Parliament, which is made to come into force on March 31, 1915, and will supersede everything before it. Therefore we start with an absolutely clean sheet. What does it say? I leave out the first two paragraphs, which do not apply: "All ships"—it does not say except ships subject to exemption but—" (other than British ships of less than 3500 tons gross tonnage, when trading coastwise or to or from the Channel Islands, and when not carrying passengers) whilst navigating in the waters from Gravesend to London Bridge or vice

1916 versa, must be conducted by pilots licensed by the London Trinity
THE NORD. House.”

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J.

Now that is compulsory pilotage in the old form, and the regulation is passed for the express purposes of war time. Under that express regulation it was compulsory, in my opinion, on the *Nord*, which is a Swedish and not a British ship, to take a pilot from Gravesend to London. She took her pilot on board at Gravesend for the purpose of being “conducted” by him to London. I think the word “conducted” means that the pilot is in charge under the old system—that is, in full charge—and entitled to all the assistance he can get from the master and crew. He is in command. Therefore I hold in this case that there was compulsory pilotage in the proper sense of the words, and there will be judgment for the defendants without costs.

Solicitors for plaintiffs: *Waltons & Co.*

Solicitors for defendants: *Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-upon-Tyne.*

T. L. M

[IN THE COURT OF APPEAL.]

HULTON v. HULTON.

C. A.

1916

Feb. 19.

Divorce—Maintenance—Wife's Petition for Maintenance—Husband's Income—Insufficient Statement by him—Further and better Affidavit—Security—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.

In July, 1915, on the petition of Mrs. H., a decree nisi was pronounced for the dissolution of the marriage between her and E. H. She filed a petition for maintenance in which she alleged that he had a very large income derived from shares in a private newspaper company, directors' fees, freehold and leasehold property, a racing establishment and breeding stud, greyhounds, and other property. By his answer E. H. declined to give minute details, but admitted an income of approximately 29,000*l.* per annum, of which 12,000*l.* per annum was derived from directors' fees, 11,475*l.* from shares in the newspaper company, and 2400*l.* from shares in another company. He offered to agree to an order for 1500*l.* a year. On an application by the petitioner for an order that he should make a further and better answer the registrar held that he had sufficient material to deal with the case in accordance with the principles laid down in *Sykes v. Sykes* [1897] P. 306 and *Kettlewell v. Kettlewell* [1898] P. 138, and refused to order a further answer; and Bargrave Deane J. dismissed an appeal from this order:—

Held (reversing the decision of Bargrave Deane J.), that there was no hard and fast rule fixing any particular proportion of the husband's income as the correct amount to be allowed for maintenance; but the Court had to consider (*inter alia*) the security to be given for the allowance, and in this case there were no materials on which this could be done; a further affidavit must therefore be filed.

APPEAL from Bargrave Deane J.

On July 8, 1915, a decree nisi for the dissolution of the marriage of the petitioner, Agnes Moir Hulton, with Edward Hulton was pronounced on the ground of the husband's adultery and desertion. There were no children of the marriage. On September 27, 1915, she filed a petition under s. 1 of the Matrimonial Causes Act, 1907, asking for an order that Edward Hulton should to the satisfaction of the Court secure to her such gross sums of money or such annual sum of money during the term of her life as to the Court might seem meet, and for that purpose that it might be referred to one of the conveyancing counsel of the Court of Chancery to settle and approve

C. A. of a proper deed to be executed by him the said Edward Hulton.
1916 By paragraphs 6 to 23 of her petition she stated that Edward Hulton
HULTON was possessed of 45,900 shares out of a total issued capital of 114,757
HULTON² shares of 1l. each in a private company known as E. Hulton & Co.,
HULTON. Limited, and that he and two of his sisters were the only shareholders
of the said company, and that his income from this company was
about 70,000l. a year; that he received large remuneration for acting
as director of that company and of other newspaper companies
and the Manchester Racecourse Company; that he owned freehold
and leasehold property in London and elsewhere, several motor cars,
a racing establishment and breeding stud, comprising valuable
horses, a large number of valuable greyhounds, and other property,
the particulars of which were not known to her. By his sworn
answer to the petition Edward Hulton said, with regard to para-
graphs 6 to 28 thereof, that many of the statements therein were
wholly incorrect, and he was advised that it was unnecessary for
him to answer them in detail. He admitted "an income of approxi-
mately 29,000l. per annum, of which 12,000l. per annum is derived
from directors' fees and 11,475l. from 45,900 shares which I possess
in E. Hulton & Co., Limited, and 2400l. from 20,000 shares which
I possess in the Umpire Publishing Company, Limited. During the
last three years the dividends on the said shares in E. Hulton & Co.,
Limited, have been at the rate of 5s. per share, and on the shares
in the Umpire Publishing Company, Limited, at the rate of 2s. 5d.
per share." He offered to consent to an order for maintenance to
the extent of 1500l. a year.

On December 10, 1915, the petitioner took out a summons for
an order that the respondent should be ordered to make and file
a further and better answer to the petition for maintenance and the
petitioner's time for delivery of reply be extended for fourteen days
after the respondent had filed his further answer. The registrar
stated that in the answer he had sufficient material to deal with the
case in accordance with the principles laid down in *Sykes v. Sykes* (1)
and *Kettlewell v. Kettlewell* (2) and refused to order a further answer.
Bargrave Deane J. dismissed the appeal, and the petitioner appealed
and asked for a further affidavit by the respondent as to his property
and means from all sources.

(1) [1897] P. 306.

(2) [1898] P. 138.

Priestley, K.C., W. C. Willis, and D. M. Hogg, for the appellant. Under s. 1, sub-s. 1 (1), of the Matrimonial Causes Act, 1907, the Court has power on a decree for dissolution of marriage to order the husband to secure to the wife such gross or annual sum of money as, having regard to her fortune (if any), to the ability of the husband, and the conduct of the parties, it may deem reasonable, and to refer the matter to one of the conveyancing counsel of the Court to settle a proper deed for that purpose. The Court thus has power to examine the particulars of the husband's income in order to approve of the security to be given by him. The Court is bound to come to a conclusion on this question of security, and there are no materials in this case on which this can be done. The husband does not allege that he has any securities which the Court could accept, and he does not say that his income is 29,000*l.* "and no more." The shares in this company have no market value. The learned judge agreed with the registrar that a rule had been laid down that 3000*l.* a year was the largest allowance which would be allowed to the wife in any circumstances, and referred to *Sykes v. Sykes* (2) and *Kettlewell v. Kettlewell*. (3) Those cases were under s. 32 of the Act of 1857, but that is the same as s. 1 of the Act of 1907. They depended on special circumstances, and did not profess to lay down any general rule. The alimony is a question for the discretion of the Court, and there are not sufficient materials before it. Only a personal income is shown, and that is not enough. *Twentyman v. Twentyman* (4), to the effect that the Court has no power to order a lump sum as maintenance, is overruled by s. 1 of the Act of 1907.

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Gordon Hewart, K.C., and Bayford, for the respondent. Under

(1) Matrimonial Causes Act, 1907, s. 1, sub-s. 1: "The Court may, if it thinks fit, on any decree for dissolution or nullity of marriage, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it may deem reason-

able, and for that purpose may refer the matter to any one of the conveyancing counsel of the Court to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the Court may, if it thinks fit, suspend the pronouncing of its decree until such deed shall have been duly executed."

(2) [1897] P. 306.

(3) [1898] P. 138.

(4) [1903] P. 82.

C. A. rr. 100, 101, and 204 of the Divorce Rules the question of main-
1916 tenance was referred to the registrar for investigation ; he had ample
HULTON powers for the purpose, and he reported to the Court that no further
v. discovery of income was required. Neither he nor the learned
HULTON. judge followed any hard and fast rule. They decided the question
on a consideration of all the circumstances, and the Court will not
interfere with the exercise of their discretion. If the Court is not
satisfied with the security offered it can order good security to be
provided. We have given sufficient information. The admission
of an income of 29,000*l.* implies that we have no more.

Priestley, K.C., replied.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Bargrave Deane J., and it undoubtedly raises a question of importance. The wife obtained a decree nisi of divorce some little time ago. That being so she petitioned under s. 1 of the Matrimonial Causes Act, 1907, for an allowance which may be, according to the language of the section, not merely during the joint lives, but during the whole life of the wife. [His Lordship read the section.] Those words about the conveyancing counsel clearly contemplate the obtaining of a security which the Court may think fit in a particular case to order to be given. There are a few general observations that I wish to make before dealing with the particular facts here. The question of the amount which ought to be allowed to the wife in the present case does not directly arise at this moment. The question really is whether before deciding that question further materials ought not to be furnished. I am satisfied that there is no hard and fast limit of 3000*l.* a year—Mr. Gordon Hewart has not contested that proposition—nor is there any fixed proportion of the husband's income to which the wife would be entitled. The amount is for the Court in its discretion to determine when it has the proper materials before it ; but I think the value of the husband's property or, in the words of the statute, his "ability" must be considered by the Court. I think the Court ought to have before it sufficient to enable it to know what security, if any, can be given. By saying this I do not in the least mean that when dealing with a large fortune the Court is necessarily to be furnished with such minute particulars as might be required under some circumstances ;

but I do think this, that the husband must positively by affidavit, or by answer or otherwise made on oath, state what is his maximum income. It is not sufficient for him to say "I admit that my income is so and so, £x." He must say it is £x and no more—that that is the maximum income which he has.

Now, applying that to the facts of the present case, let us see how it stands. The wife in her petition makes various statements as to the husband's conduct which will have to be considered, of course, under the language of the section. She states that the husband is possessed of 45,900 shares out of an issued capital of 114,757 shares in Edward Hulton & Co., Limited, and that he and his two sisters are the only shareholders in that private company. It is not a company for whose shares there is any quotation, but it is a private company which, for aught I know, may by its constitution be so framed that there cannot be a transfer of shares to anybody else unless he is already a shareholder or a member of the family. The petition then says there are a great many other papers in which the respondent is interested. It says in paragraph 9 he derives from his holding in the company an income which has been 40,000*l.* and upwards and is now 70,000*l.* a year, and it says there are reserve profits. In addition there are some other shares in another company, which shares he holds partly with his sisters. He is the governing director of the company and receives a large remuneration and commission. He is directly or indirectly interested in a company known as the Umpire Publishing Company, and he is interested in other newspapers; and then it goes on to say that he is possessed of a leasehold house in Great Cumberland Place in London, with a garage and stables, that he is possessed of other valuable freehold and leasehold premises, stables, and other premises; that he is possessed of very valuable motor cars, one of them worth about 2000*l.*, that he has a large racing establishment, a number of valuable racehorses, and a valuable breeding stud; that he makes large sums of money by betting, and that he has bought racehorses during the last eight years to a value exceeding 52,000 guineas; that he is possessed of valuable greyhounds, and is interested in large sums of money in various banks and stocks, shares, and other securities. Then the petitioner asks for security for the allowance. How is that dealt with? The husband by his answer admits the

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statements as to the shares in E. Hulton & Co., Limited, and he says this: "I am advised it is unnecessary for me to answer the statements in detail. I admit an income of approximately 29,000*l.* per annum, of which 12,000*l.* per annum is derived from directors' fees"—which, of course, will cease with his life—"and 11,475*l.* from 45,900 shares which I possess in E. Hulton & Co., Limited, and 2400*l.* from 20,000 shares which I possess in another company." He says the dividends have been fairly constant, and at the end he says: "I am willing to consent to an order for maintenance to the extent of 1500*l.* per annum, which I submit is a fair and proper sum." In my opinion that, which is the only material before the Court, does not disclose enough to enable the Court properly to exercise its judicial discretion as to the amount of allowance which ought to be made for the wife or as to the security which ought to be given to her for such allowance to be made. It seems to me that the Court must be in a position, either by an admission made before the registrar that the husband's income is so much and so much only, or an admission which is accepted by the petitioner, or must be satisfied by the husband on oath, as to what his maximum income is and what is the property on which he is prepared to offer security. In the present case the materials are not, in my judgment, sufficient to enable the Court to decide the question. I say nothing about whether 3000*l.* a year is sufficient. This is not the time to decide that, but the question of the husband's income is a material matter to be considered. I am not prepared to assent to the view that the amount of the husband's income, whether it be 29,000*l.* or whether it be 59,000*l.*, is not a matter which ought to be before the Court in considering what is the allowance to be made. For these reasons I think the appeal must be allowed, the order must be discharged, and that there should be an order for a further and better answer to be made by the husband.

PHILLIMORE L.J. I am of the same opinion. As we are differing from the learned judge in the Court below I will say a few words, and they will be few. I agree with the canons and general principles laid down by the Master of the Rolls. It seems to me difficult, having regard to the section of the statute,—I do not say impossible

—to release the husband from the duty of deposing to his maximum income ; but I wish it for myself to be understood—and I think it is the opinion of the Master of the Rolls—that it does not at all follow there should be the same nicety of scrutiny when the income is large and admitted on oath, and fairly admitted, as there should be if the income were small. If, for instance, a man were to state on oath—and I am taking very large figures purposely—that his maximum income was 100,000*l.* a year and no more, there should not be inquisitions as to the sources of that income upon suggestions that it would turn out to be 110,000*l.* or 120,000*l.* I agree entirely that there is no such thing as a limit of 3000*l.* a year, and I also agree, on the other hand, there is no such requirement as a third when the fortune is large. The amount ought to be enough for the wife considering what the ability of the husband is and considering the other circumstances of the case as provided by the statute. I cannot construe Mr. Hulton's affidavit here as a declaration that his income is 29,000*l.* approximately and no more ; therefore I cannot treat his answer as sufficient. Again, his answer is defective in not either showing securities on which the Court could lay hands or making some offer or submission which would avoid the necessity of showing such securities. Therefore I agree that this appeal should be allowed.

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WARRINGTON L.J. I agree. I only wish to say this, as we are differing from the learned judge, that having carefully considered the affidavit filed by the husband, and taking it, as I think one is bound to do, in connection with the petition to which it is an answer, I cannot bring myself to say that the husband has frankly furnished to the Court sufficient materials to enable it to decide the two points that it has to decide. The first is what would be, having regard to the circumstances mentioned in the section of the Act, a reasonable sum to allow for the maintenance of the wife, and, secondly, by what means, looking at the interests not only of the wife but of the husband as well, the payment of the sum so allowed ought to be secured.

Appeal allowed.

Solicitors : *Guedalla & Jacobson ; Lewis & Lewis.*

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Feb. 9, 10,
11.

[1915, fol. 139.]

Admiralty—Salvage—Action in rem—Motion on behalf of Crown to stay Proceedings—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557—Requisitioned Ship—Proclamation of August 3, 1914 (Transports and Auxiliaries)—Costs.

After the outbreak of war, the plaintiffs, the owners, master, and crew of a steam tug, commenced a salvage action in rem against the owners of a steamship, her cargo and freight; but they did not arrest the vessel, and subsequently abandoned the claim against the cargo, which consisted of oil fuel for the use of the Navy and was the property of the Crown. The owners of the steamship and her freight appeared as defendants, and gave the usual undertaking in lieu of bail, statements of claim and defence being subsequently delivered.

Prior to the commencement of the salvage action the steamship had been requisitioned under the powers conferred by the Royal Proclamation (Transports and Auxiliaries) of August 3, 1914, and as the vessel thereby became, for the time being, a ship belonging to His Majesty, within the meaning of s. 557 of the Merchant Shipping Act, 1894, the Crown applied for and, (on appeal), obtained an order that all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as the vessel remained under requisition in the service of the Crown, as, by reason of the requisition, the vessel, for the time being, belonged to the class of "things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined" (*The Parlement Belge* (1880) 5 P. D. 197, 210). There would be no order as to costs on the ground that the intervention was direct on behalf of the Crown, and not through the Lords Commissioners of the Admiralty, so that the Admiralty Suits Act, 1868, did not apply.

APPEAL on behalf of the Crown, in an action of salvage in rem, against an order of Bargrave Deane J. dismissing with costs, to be paid by the Crown, a motion that "the writ and all subsequent

proceedings in the action be set aside or that the proceedings against the *Broadmayne* and her freight be stayed so long as the ship shall remain in the service of the Crown or for such further or other order as to the Court may seem just."

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On February 8, 1915, the plaintiffs, the Elliott Steam Tug Company, Limited, of London, as the owners, and the master and crew of the steam tug *Revenger*, issued a writ in an action in rem against the owners of the tank steamship *Broadmayne*, her cargo and freight, for an award in respect of certain salvage services rendered by the tug to the steamship two days previously. The steamship was not arrested, and on February 11 her owners entered an appearance as defendants and gave the usual undertaking in lieu of bail. A statement of claim was delivered on June 22, a statement of defence on August 6, and on November 3 notice was given by the plaintiffs abandoning their claim against the cargo, which consisted of oil fuel for the use of the Navy and was the property of the Crown.

On November 24 the Treasury Solicitor, acting as intervener on behalf of the Crown, gave notice of motion to the plaintiffs for an order in the terms set out above.

On January 14, 1916, Bargrave Deane J. dismissed the motion with costs to be paid by the Crown, on the ground (1.) that, at the time the salvage services were rendered, the *Broadmayne* had not been requisitioned, and therefore the steamship could not claim immunity from the action on the ground that she was, for the time being, under s. 557 of the Merchant Shipping Act, 1894, a King's ship; (2.) that the act of the defendant owners of the steamship in substituting a personal undertaking in lieu of bail had converted the action in rem into an action in personam, and therefore the objection that the steamship by arrest would be liable to be withdrawn from the service of the Crown did not apply; (3.) that the salvage services could not be deemed to have been rendered otherwise than voluntarily, as, even assuming that the tug was, at the material time, under the orders of the Admiralty with a view to being requisitioned, both forms of charter in use by the Admiralty contemplate the performance of voluntary salvage services, the vessel performing them being off time so far as the Admiralty is concerned.

In the course of the arguments the following cases were referred

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 1916 By counsel for the Crown: *The Constitution* (4); *The Hopper*
 THE No. 66 (5); *Young v. S.S. Scotia* (6); *The Parlement Belge* (7);
 BROAD- *The Prins Frederik* (8); *The Athol* (9); *The Marquis of Huntly* (10);
 MAYNE. *The Warrior* (11); *The Duc d'Aumale* (No. 2) (12); *Five Steel*
Barges (13); *The Bertie*. (14) By counsel for the plaintiffs: *The*
Leon Blum (15); *In re a Petition of Right* (16); and in the Court
 of Appeal: *The Lord Hobart* (17); *De Haber v. Queen of Portugal* (18);
The Leda. (19)

On appeal on behalf of the Crown:—

Sir F. E. Smith, A.-G., Aspinall, K.C., and R. H. Balloch, for the Crown.

Bateson, K.C., and C. R. Dunlop, for the plaintiffs, the owners, master, and crew of the tug *Revenger*.

Lewis Noad held a watching brief for the defendants, the owners of the *Broadmayne* and freight.

The arguments of counsel fully appear from the judgments. Early in the course of those arguments the Court suggested for the consideration of counsel whether, in the circumstances of this case, the object of the Crown would not be attained by an order to the effect that so long as the *Broadmayne*, as a requisitioned ship, remained in the service of the Crown, the plaintiffs be restrained from all proceedings in the action in rem having for their object the arrest or detention of the vessel; the Court at the same time intimating that it declined to accede to the suggestion of counsel to give any general directions for the guidance of the Admiralty Marshal and his subordinates in cases of this description, as such directions, if given at all, should be given by the Admiralty judges. Ultimately counsel for the Crown agreed to accept an order in the

(1) [1892] P. 304.

(2) [1899] P. 285.

(3) [1912] P. 8.

(4) (1879) 4 P. D. 39.

(5) [1908] A. C. 126.

(6) [1903] A. C. 501.

(7) 5 P. D. 197.

(8) (1820) 2 Dod. 451.

(9) (1842) 1 W. Rob. 374.

(10) (1835) 3 Hagg. Adm. 246.

(11) (1862) Lush. 476.

(12) [1904] P. 60.

(13) (1890) 15 P. D. 142.

(14) (1886) 6 Asp. M. L. C. 26.

(15) [1915] P. 90, 103.

(16) [1915] 3 K. B. 649.

(17) (1815) 2 Dod. 100.

(18) (1851) 17 Q. B. 171.

(19) (1863) Br. & Lush. 19.

above-mentioned form, at the same time intimating that the Crown did not thereby give up the position that, whilst a requisitioned ship was in the service of the Crown, an action in rem against her was bad ab initio.

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1916. Feb. 11. SWINFEN EADY L.J. This is a motion by way of appeal made on behalf of the Crown that the writ and all subsequent proceedings in the action be set aside, or, in the alternative, that the proceedings against the ship and freight may be stayed so long as the ship shall remain in the service of the Crown.

The application was made, in the first instance, to Bargrave Deane J., and he refused the application and ordered the Crown to pay the costs of the plaintiffs and of the defendants.

The facts are, shortly, these : Immediately before the outbreak of war—the state of war commenced as from 11 P.M. on August 4, 1914—a Proclamation was issued stating that a national emergency exists rendering it necessary to take steps for preserving and defending national interests and authorizing the Lords Commissioners of the Admiralty . . . to requisition and take up . . . any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles or the waters adjacent thereto, for such period or time as may be necessary, on condition that the owners of all ships and vessels so requisitioned shall receive payment for their use, and for services rendered during their employment in the Government service . . . according to terms to be arranged as soon as possible after the said ship has been taken up, either by mutual agreement between the Lords Commissioners of the Admiralty and the owners, or failing such agreement by the award of a Board of Arbitration.

The Proclamation bears date August 3, 1914. It is not disputed—indeed it is beyond dispute—that it is part of the prerogative of the Crown in times of emergency to requisition British ships. In Chitty's Prerogatives of the Crown, at p. 50, this passage occurs : “ The King may lay on a general embargo, and may do various acts growing out of sudden emergencies ; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war,

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1916 unlimited regulations.”

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In view of the existence of a national emergency the Crown had power to requisition British ships, and on September 3, 1914, requisitioned the ship in question, the *Broadmayne*. The ship, a tank steamer, at the time in question when the salvage services were rendered, was carrying fuel oil for the British Government. She, having been requisitioned on September 3, was under requisition and remained so at the time of the events that took place and which led up to these proceedings.

On February 5, 1915, the steamer, laden with her cargo of fuel oil, stranded outside Harwich Harbour. Instructions were given by the King's Harbour Master to the tug *Revenger* to proceed to her assistance.

Nothing now turns upon the character of the tug. No question arises in these proceedings as to whether the tug could, or could not, claim salvage remuneration. That is a claim to be adjudicated upon in the action.

The *Revenger* proceeded to the assistance of the *Broadmayne*. On February 5 she attempted to tow her off, but failed. She renewed the attempt the next day, February 6, and succeeded, and the *Broadmayne* was successfully towed into the harbour.

On February 8 the writ in the present proceedings was issued. The writ is a writ in rem. The plaintiffs are “the owners, master, and crew of the steam tug *Revenger*,” and the defendants “the owners of the steamship *Broadmayne* and the cargo now or lately laden thereon and the freight due for the transportation thereof.” The writ is in the ordinary form directed to the owners and the parties interested in the steam vessel *Broadmayne* and the cargo, and commanding them to enter an appearance. No address is given of the defendants beyond the name of the ship. The essential for a writ in a personal action, that the address of the defendant should be inserted, does not appear here.

The memorandum with regard to the service of the writ, which is prescribed by the rules to be placed upon a writ in rem, appears on this writ. It was a service on the vessel and cargo by nailing the original writ for a time on the mast and then by leaving a true copy of it only. There can be no question that it is an ordinary

writ in rem against the ship and cargo and freight. On February 11 an undertaking was given by the solicitors, thus: "We accept service and undertake to appear and put in bail and prove value on the defendants' behalf in due course."

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On February 17 an appearance was entered—a common appearance, not an appearance under protest. Under Order ix., r. 10, of the Rules of the Supreme Court, "In admiralty actions in rem no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service and to put in bail, or to pay money into Court in lieu of bail." That applies to this case. On June 22 the statement of claim was delivered in the action, and on August 6 the defence. Then on November 24 notice of motion was served in the Admiralty Division on behalf of the Crown asking to set aside the writ, or, alternatively, for a stay of proceedings. The cargo of fuel oil belonged to the Crown, and the Crown is not liable to be impleaded—that is, is not liable to be sued in respect of the cargo on board; and when it was pointed out that the cargo belonged to the Crown, notice of discontinuance of the action against the owners of the cargo was served, though, true it is, that formal discontinuance was not served till after formal notification of the present motion was given. The writ was admittedly wrong in that an attempt was made to sue the owners of the cargo in the circumstances in question; but as notice of discontinuance has been served and no claim is now made in regard to the cargo, all further reference to the cargo may be omitted.

It is clear that a ship which is requisitioned by the Crown is as free from arrest as a King's ship of war would be, and the exemption extends as well to claims of salvage as to claims of collision or other claim. The grounds upon which the exemption exists were fully stated in the judgment of the Court of Appeal in the case of *The Parlement Belge* (1), where the whole question is discussed. The late Master of the Rolls, Lord Esher, in giving the judgment of the Court, said: "On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the Government as part of the military force of the state. On the other side it is contended that all moveable property, which is the public property

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1916 adverse interference by any Court of Judicature." Then he said :

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" The point and force of this argument is that the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses ; and that, by international comity, which acknowledges the equality of states, if such immunity, grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. The dignity and independence of each state require this reciprocity. It was this reasoning which induced Sir William Scott to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reason could not be controverted. The case has always been considered as conveying his opinion to have been to that effect. Such was the view of Lord Campbell, who in *De Haber v. Queen of Portugal* (1) says that the difficulties suggested by the argument were in the opinion of Sir William Scott insuperable. But if so, he assented to an argument which embraced in one class 'all public property' of the state, and treated 'armed ships of war' as a member of that class."

It was urged by counsel for the plaintiffs that the effect of requisitioning a ship is not to change the ownership, and the ship requisitioned remains the property of the owners notwithstanding the requisitioning, and that when the use of the ship by the Crown ceases the ship is restored to her owners. That is so, but it does not prevent a ship so long as she remains under requisition being in the service of the Crown, and as such exempt from process of arrest.

In these circumstances the question arises what ought to be done on the present motion. By reason of the writ having been issued the plaintiffs have been given an undertaking for bail, but bail has not been given. In the present case no doubt bail will be given in ordinary course. But technically the ship is not free from arrest because bail has not been given, and I am of opinion that an order ought to be made in this action restraining any further proceedings in the action with a view to the arrest of the ship, and consequentially that all proceedings in the action for that purpose ought to be stayed

(1) 17 Q. B. 171.

for so long as the ship shall remain under requisition by and in the service of the Crown.

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I am satisfied that an order in that form will give ample protection to the Crown in this case, because, in addition, there is the statement of the law that ships so requisitioned are exempt from arrest, and that no proceedings with a view to arrest can properly be taken so long as a ship is under requisition.

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There remains the question of costs. Below, the learned judge ordered the Crown to pay the costs both of the plaintiffs and of the defendants. Now the ordinary rule is that the Crown does not pay or receive costs, except so far as that rule was affected by the Crown Suits Act. It is not suggested that this case is within that Act. In admiralty proceedings the rule was "no costs either side." The practice was settled in the case of *The Leda* (1), decided in 1863. Then came the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), and by that statute "the term 'Admiralty' means the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral," and (s. 3) power is given to the Admiralty to "institute any action, suit, or proceeding . . . concerning any debt, damages, claim, demand, or cause of action or suit whatever arising out of any matter in anywise relating to the rights, powers, or duties of the Admiralty, or to property vested in or purchased by or being under the management or control of the Admiralty." And then (s. 5): "In any such action, suit, or proceeding the Admiralty shall be liable and entitled to pay or receive costs according to the ordinary law and practice relative to costs." Again (s. 6): "Nothing in this Act (except as expressly otherwise provided) shall take away or abridge in any such action, suit, or proceeding any legal right, privilege, or prerogative of the Crown"

The Admiralty are not parties to these proceedings. This is a motion directly on behalf of the Crown, and is not within the provisions of the Admiralty Suits Act. In these circumstances I am of opinion that the order below was wrong so far as regards costs, and that the learned judge had no jurisdiction to order the Crown to pay the costs of either the plaintiffs or the defendants.

There was a slip in the proceedings in the Court below, because

(1) Br. & Lush. 19.

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the learned judge treated the *Broadmayne* as a ship which had not been requisitioned. He gave the date of the requisitioning as September 3, 1915, and by some misunderstanding it was not appreciated that the ship had been requisitioned on and as from September 3, 1914. So that the basis on which he dealt with the case that she was not a requisitioned ship at the time of the salvage services and at the time of the commencement of the proceedings, the material dates, was erroneous in point of fact.

In these circumstances I am of opinion that the appeal ought to be allowed and an order made in the form I have indicated. A suggestion was made that certain instructions or directions should be given in regard to the future; but if instructions are to be given, they should be given by the judge of the Admiralty Court. All that we can do is to say in terms that ships in this position are not liable to be arrested, and therefore no proceedings ought to be taken with a view to arresting a ship so long as the ship is in the service of the Crown and under requisition.

The order will be in this form: "On the motion of the Crown discharge order of Mr. Justice Bargrave Deane, and the plaintiffs having discontinued this action so far as concerns any claim as against the owners of the cargo, it is ordered that all further proceedings in this action with a view to the arrest or detention of the ship be stayed for so long as the ship shall remain under requisition in the service of the Crown."

The order will be silent as to costs.

PICKFORD L.J. I am of the same opinion.

The motion by the Crown is for an order that the writ and all subsequent proceedings in this action be set aside, or that the proceedings against the *Broadmayne* and her freight be stayed so long as the ship shall remain in the service of the Crown. The writ was originally issued against the cargo as well as the freight; but as soon as it was ascertained that the cargo was the property of the Crown the action was discontinued so far as the cargo was concerned. It is true that the formal notice of discontinuance was not filed until after this notice of motion; but it is clear from the terms of the notice of motion that the Crown at this time were aware that no proceedings were going to be taken against the cargo, and there-

fore in their notice of motion they do not mention the cargo at all, but merely ask that the proceedings be set aside as against the *Broadmayne* and her freight. Therefore the question of the cargo may be considered as out of this case so far as we are concerned.

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The ground of this notice of motion was that the *Broadmayne* was a requisitioned ship. She had been requisitioned for the service of the Crown, and in order to see what the position is with regard to such a ship one has to see what requisition means. There is no particular magic in the word itself; it does not connote the same state of things in every particular case. In this case it was under the Proclamation of August 3, 1914, that the ship was requisitioned, and that authorized the Lords Commissioners of the Admiralty to requisition and take up for the service of the Crown any British ship for certain services on condition that the owners of all ships and vessels so requisitioned should receive payment for their use and for services rendered at an agreed amount, or, if there be not an agreed amount, an amount to be settled by a Board of Arbitration appointed by the Crown. In this case no arrangement had been arrived at at the time of the services rendered. A certain form of charter, which is well known as the Government time charter, was sent to the owners of the ship, and they returned it with some alterations which were not assented to by the Crown, and therefore no agreement was come to. It must be taken that she was requisitioned for the service of the Crown at a rate of remuneration which had not then been settled, but which would be settled in the future, or, if not settled, at a reasonable rate of remuneration. That is really nothing more than a hiring of the ship, and the effect of the requisition is that His Majesty has the power to make the owner of the ship come to that hiring agreement. The owner of the ship has no alternative as to whether he will accept the proposition of hiring or not, but the vessel is after all a hired ship. It does not take the property of the ship out of the owner and vest it in the Crown, and therefore this vessel is not for all purposes in the same position as a vessel which is the property of the Crown. You cannot take proceedings in rem against a ship which is the property of the Crown, because the result of doing so is to attempt to bring the King as a defendant into his own Court just as much as if you were to try to serve a writ in personam upon him personally. You bring him, or attempt to

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bring him, into his Court by means of his property instead of by means of his person ; but that really does not make any difference, and therefore in the case of these ships, the property of the Crown, proceedings cannot be taken against them because they are proceedings against the King. That is not this state of things. Here the vessel remains the property of her previous owners—the American Oil Company I think they were. She still remains their property, and is liable to satisfy claims upon them subject to the right of the Crown not to have its prerogative interfered with, and not to have its interest in any way deteriorated.

What happened was this : The writ was communicated to the solicitors for the owners of the *Broadmayne*. The owners of the *Broadmayne*, I suppose not having any more information about the ownership of the cargo than the plaintiffs, had given an undertaking to appear and put in bail for the ship and cargo ; but, as I have said, the proceedings against the cargo are out of this case, and we need not say anything more about it. They undertook to put in bail for the ship. As long as that undertaking remains the ship is free from arrest. The result of it is that so long as the undertaking exists it is the same as putting in bail, and if you put in bail the ship is released and cannot be re-arrested except in some very exceptional circumstances, though I think ships have been re-arrested for costs, or something of that kind. But for all practical purposes the ship is free from arrest as soon as bail is put in, and also she is free from arrest when an undertaking to give bail is put in unless that undertaking falls through for some reason which is not suggested in this case. Now, that being so, the position was this. The plaintiffs had brought on proceedings against the owners of the *Broadmayne* which, in my opinion, they were entitled to bring. The owners of the *Broadmayne* had appeared and undertaken to give bail, and had thereby put themselves in this position, that they were liable to the amount of the bail, and also, according to *The Gemma* (1) and *The Dictator* (2), if a judgment were obtained to a larger amount than the bail, they were also liable for that personally ; but nothing more could be done as against the ship. Now that was an action between two private litigants, perfectly properly constituted, and which could, and would, if it were not interfered with, go on to its appro-

(1) [1899] P. 285.

(2) [1892] P. 304.

priate end and judgment on either one side or the other without any possibility, except the very remotest,—I do not think I ought to say no possibility—of interference with the rights of the Crown. The learned counsel for the Crown, to whom I put the question, said he could not suggest anything in these proceedings, if they went on, which would affect the rights of the Crown except that they possibly might encourage other people to bring similar litigation under other circumstances which would affect its rights. I confess I could not quite follow that argument. I do not see why, if there is not a right to interfere with the litigation itself, it should be interfered with in order to prevent a possibility of somebody else doing wrong. Why the Crown should have chosen to intervene in this particular litigation in which the interests of the Crown were not in the least concerned I do not know. I daresay they had some reason for doing so and not waiting until there was a proceeding in which their interests were possibly compromised, but that was the position. I agree entirely with what has been said by my Lord as to the position. I think nobody has any right to arrest a ship requisitioned under these circumstances so long as she is in the service of the Crown any more than he has the right to arrest a man-of-war. He may bring his action, if he likes, against the owners, but he cannot interfere with the rights of the Crown in a ship. The rights of the Crown are to have her services during the time she is requisitioned. During that time, as I have said, I do not think anybody has a right to arrest her, and therefore I think that the position is this: that this action should be allowed to go on; there is no ground for interfering with it except to this extent, that the plaintiffs should be restrained—I am not speaking exactly of the form at the moment—from doing that which they have always said they had not the slightest intention of doing, and which I cannot help thinking the Crown knew quite well they had no intention of doing, namely, take any proceedings to arrest this ship, or in any way to interfere with her so long as she is in the service of the Crown. That, I think, is the right position, and that is the order (I do not mean the words in which I put it) in substance which in my opinion should be made. I may say that I think, except for the point of deciding, as we have decided, that a ship so long as she is requisitioned cannot be arrested, as long as she is in the service of the Crown, we ought not to lay down any

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general rule as to what ought to be done in the case of actions against the owners of requisitioned ships. It was suggested by Mr. Aspinall, and I think also by the Attorney-General, that we should lay down some rule for the conduct of the Marshal in cases of this kind. I do not think we ought to do anything of the sort. If any directions are to be given to the officials of the Admiralty Court, general instructions of that kind, it seems to me that they should be given by the judges of the Admiralty Court, who are far more familiar with the practice, and who can do it far better than we can, and I am inclined to think that it is—I will not say outside our jurisdiction—really outside the scope of what we have to do to lay down any such general rules.

I agree also with Swinfen Eady L.J. on that point, and also as to costs.

BANKES L.J. Two questions arise for decision on this appeal: first, the effect upon an action in rem in the Admiralty Division of the appearance in the action of the owner of the res, and the giving by him of bail or an equivalent undertaking; and, secondly, the position with regard to liability to arrest of a requisitioned vessel against which an action in rem has been brought.

In my opinion an action which has been commenced as an action in rem continues until its termination as an action in rem unless it undergoes some alteration in its character by amendment, by order of the Court, or under the rules of Court. It is, in my opinion, a mistake to say that the action changes its character and ceases to be an action in rem and becomes an action in personam when the owner of the res appears and gives bail. It is no doubt true that when this is done the action, so far as its special characteristic as an action in rem is concerned, has served its purpose, or possibly its chief purpose, when the owner of the res has been induced, by reason of the arrest or fear of arrest of his vessel, to enter an appearance and to give bail in order to obtain the release, or avoid the seizure, of his vessel. It is also true that when once the owner of the res has appeared the plaintiff has the advantage of being able in case of necessity to take his property in satisfaction of the judgment in addition to the bail. These consequences, however, are, in my opinion, incidents only which arise in the course of the action in

rem, which add to its value but which in no way alter or deprive it of its special character.

The position is, I think, quite clearly indicated in the passage from Clerke (1), cited with approval by Jeune J. in *The Dictator* (2), where the writer says that after appearance the case proceeds "ut in actione instituta contra personam debitoris"—that is to say, that the action is to proceed as if, but only as if, it was an action in personam. The advantage of the action being an action in rem still remains in the sense that, should the exceptional occasion arise, the Court in a proper case would no doubt still have jurisdiction to order the arrest of the vessel.

With regard to the second point, I entertain no doubt that a vessel, if and so long as she is under requisition, is privileged from arrest. The requisition is made under the prerogative of the Crown, and the fact that the Proclamation of August 3, 1914, indicates that payment will be made for the use of the vessel, and for services rendered during her employment in the Government service, does not, in my opinion, alter the nature or the consequences of the act of requisition. It is, in my opinion, equally immaterial that the terms of payment and employment are incorporated in a charterparty or other form of agreement. The vessel, whilst the requisition lasts, is, to use the language of Dr. Arnold in his argument in the case of *The Prins Frederik* (3), approved by Lord Esher in *The Parlement Belge* (4), "publicis usibus destinata," and as such not liable to the claims or demands of private persons.

I agree with the proposed order which is to be made in this case.

Appeal allowed.

Solicitor intervening on behalf of the Crown: *The Treasury Solicitor*.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *W. A. Crump & Son.*

(1) Praxis Curiae Admiralitatis.

(3) 2 Dods. 451, 468.

(2) [1892] P. 304, 311.

(4) 5 P. D. 197, 209.

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HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

(IN PRIZE.)

THE EDEN HALL.

[1914, No. 418.]

Prize Court—Jurisdiction—Turkish Cargo on British Ship—Discharge in British Port—Storage in Bonded Warehouse in Port—Subsequent Outbreak of War with Turkey—Seizure as Prize and Droits of Admiralty.

Before the outbreak of war between Great Britain and Turkey twelve bales of tobacco, the property of a Turkish merchant in Smyrna, were landed in the Port of London ex a British ship and were stored in a bonded warehouse in the port. After the outbreak of war with Turkey the goods were seized as prize and droits of admiralty :—

Held by the President (Sir Samuel Evans), that, on the principles laid down in *The Roumanian* [1915] P. 26 ; [1916] A. C. 124, the goods were the subject of seizure as maritime prize and must be condemned.

CAUSE for condemnation of goods as prize and droits of admiralty.

Before the outbreak of war between Great Britain and Turkey twelve bales of Suluk leaf tobacco were shipped on board the British steamship *Eden Hall* by one Platon Macri, a Turkish merchant at Smyrna, consigned to his order, London. On October 23, 1914, the *Eden Hall* arrived in the Port of London. On October 28 the tobacco was discharged in the Victoria Docks and stored in a bonded warehouse within the port under the control of the Commissioners of Customs.

On November 5 war broke out between Great Britain and Turkey. On November 10 the goods were placed under detention as suspect cargo, and on December 11 were formally seized as prize.

On January 7, 1915, an appearance was entered on behalf of Platon Macri, who was described as of Athens, but the claim filed on March 27 stated that it was made on behalf of Platon Macri, of Smyrna.

1916. March 30. *Sir George Cave, S.-G.*, and *Commander Maxwell Anderson, R.N.*, for the Procurator-General. The goods were still within the Port of London and therefore were rightly seized as enemy cargo found in port after the outbreak of hostilities : *The Marie Anne* (1) ; *The Roumanian*. (2) In *The Roumanian* (2) Lord Parker said “. . . no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.” (3)

A. Neilson, for the claimant. These goods were not the subject of maritime prize. The case is distinguishable from *The Roumanian*. (2) In the present case the goods were landed before the outbreak of war. Enemy goods found on the territory of a belligerent at the commencement of hostilities are not the subject of prize : *Brown v. The United States*. (4) If enemy cargo is subject to seizure as prize merely because it happens to be still in port at the outbreak of war, it follows that goods such as tobacco—which may have been in a bonded warehouse for years—could be condemned, and there is no authority for such an extension of the doctrines laid down in *The Roumanian*. (2)

Sir George Cave, S.-G., replied.

SIR SAMUEL EVANS, PRESIDENT. This application relates to twelve bales of Suluk leaf tobacco shipped by Platon Macri, of Smyrna, to his own order. His claim has been put forward as a claim by a person who is entitled to have the goods restored to him because they were seized on land, having been seized in a bonded warehouse to which they had been removed prior to the outbreak of war.

The facts in the case are not in dispute. This tobacco was put on board the *Eden Hall*, which sailed from Smyrna on October 3, 1914. The vessel arrived in the Port of London on October 23. On October 28 the goods were discharged and were put in a bonded warehouse in the Port of London. It is admitted that the bonded warehouse was a bonded warehouse approved pursuant

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| (1) (1805) <i>Rothery's</i> | Prize | 124. |
| <i>Droits</i> , 126. | | (3) [1916] A. C. 144. |
| (2) [1915] P. 26 ; [1916] A. C. | | (4) (1814) 12 U. S. 110. |

1916 to statute by the Customs authorities, and it is admitted in terms
 THE that the warehouse itself was within the Port of London. The
 EDEN HALL. goods remained there until the outbreak of war between this
 The President. country and Turkey on November 5. Five days afterwards the
 goods were detained by the Customs authorities representing the
 Crown. Notification to that effect was given shortly afterwards,
 and on December 11 there was a more formal seizure as prize.

An appearance was entered on behalf of Platon Macri in which he was described as Platon Macri, of Athens, which was and is a neutral city, but his claim is now honestly put forward as that of an enemy. These goods therefore belonged to an enemy at the time of seizure; and the only question I have to decide is whether the case can be distinguished from the case of *The Roumanian*. (1) Some of the facts are different, but, applying the principles explained and declared by the Privy Council in *The Roumanian* (2) to this case, I do not see any material distinction. Upon the broad ground that these goods were in port—in a warehouse belonging to the port—at the time of the outbreak of hostilities I think it follows that they were goods which were the proper subject of maritime prize, and that the case is governed by *The Roumanian*. (2)

Of course, if the tobacco had been dealt with in the ordinary way of commerce, by bills of lading assigned to somebody else, or had been warehoused for somebody else as purchaser, the case would have been different; but these goods were put in that warehouse and remained there as the goods of a Turkish subject up to the time of seizure, and they must be condemned to the Crown as prize and droits of admiralty.

Solicitor for the Procurator-General: *The Treasury Solicitor*.

Solicitors for claimant: *W. A. Crump & Son*.

(1) [1915] P. 26; [1916] A. C. 124.

(2) [1916] A. C. 124.

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HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

(IN PRIZE.)

THE PRINZ ADALBERT.

[1914, No. 31.]

1915

Dec. 6.

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March 22, 23.

Prize Court—German Merchant Ship in British Port—Entry into Port for other than Commercial Purposes—Detention—Subsequent Permission to leave Port—Outbreak of War between Great Britain and Germany—Hague Peace Conference, 1907, Convention VI., Preamble and arts. 1 and 2.

By art. 1 of Convention VI. of the Hague Peace Conference, 1907, relative to the status of an enemy merchant ship at the outbreak of hostilities, it is stated to be desirable that such a ship should be allowed to depart freely either immediately or after a reasonable number of days of grace; and art. 2 provides that if, owing to circumstances beyond her control, the ship has not been able to leave the port within that period, or has not been allowed to leave, she may not be confiscated but merely detained.

The preamble to the Convention states that the contracting parties, "anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect."

On August 3, 1914, a German liner bound from Philadelphia to Hamburg with passengers and cargo, having heard of the outbreak of war between France and Germany, put into Falmouth as a neutral port of refuge to avoid possible capture by French cruisers. On the early morning of August 4 the master was told by the Customs authorities that his vessel was detained and would not be allowed to leave the port. About 4 P.M. on that day he was told that the vessel was unconditionally released, but no steps were taken on board her to indicate that she intended to leave. From 11 P.M. a state of war existed between Great Britain and Germany, and on the following morning the vessel was seized as prize:—

Held by the President (Sir Samuel Evans), that, assuming Convention VI. to be binding on this country, the vessel was not entitled to the protection afforded by arts. 1 and 2, and that she must be condemned, as she did not intend to avail herself of the permission to leave the port, and she was not in the port for commercial purposes.

A merchant vessel of a belligerent Power in an enemy port at

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the commencement of hostilities is not protected from condemnation under arts. 1 and 2 of Convention VI. if she has entered the port to avoid possible capture by the armed vessels of another belligerent, or to procure orders from another belligerent or its subjects.

On August 3, 1914, the German screw steamship *Prinz Adalbert* (Carl Schonfeldt, master), of 3769 tons gross register, belonging to the Hamburg-Amerika line, in the course of her voyage from Philadelphia to Hamburg with cargo and passengers heard of the outbreak of war between France and Germany, and her master decided to proceed to a neutral port for orders. The vessel accordingly went into Falmouth, where she arrived about 12.40 A.M. on August 4 and anchored in the inner harbour.

About 9 A.M. an officer of Customs went out to the *Prinz Adalbert* and, acting on instructions, ordered the master to dismantle the wireless telegraphic apparatus, and informed him that his vessel was detained and that if he attempted to leave the harbour force would be used to stop him. About 4 P.M. the fortress commander at Falmouth, acting on orders from the Admiralty, gave instructions, which were communicated to the *Prinz Adalbert* by the Customs authorities, that she was unconditionally released and was free to leave the harbour. No attempt was made to get up steam, and the vessel remained where she was until about 6 A.M. on August 5, when, a state of war having existed between Great Britain and Germany since 11 o'clock on the previous evening, she was seized as prize.

On December 6, 1915, the case came before the Court and was adjourned for further evidence. On March 22, 1916, when the hearing was resumed, the master of the *Prinz Adalbert* was called as a witness. He stated that he did not put into Falmouth for refuge, but on account of an appeal by a number of American and German passengers who asked to be landed in England owing to the outbreak of war.

1916. March 22, 23. *Sir Frederick Smith, A.-G., Pearce Higgins, and H. L. Murphy*, for the Crown. The *Prinz Adalbert* is liable to condemnation. She is not entitled to the protection afforded by

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arts. 1 and 2 of Convention VI. (1), the object of which, as is shown by the preamble, is to ensure the security of international commerce against the surprises of war and to protect operations undertaken in good faith and in process of being carried out before the outbreak of hostilities. This vessel did not enter the port of Falmouth on a commercial errand, but to avoid being captured by the French (see *The Belgia* (2)), and possibly also to get instructions from her owners. The detention on the morning of August 4 was justified as an embargo. War with Germany was imminent, and it is not necessary for a declaration of war to precede the first act of force : Westlake's International Law, part 2, p. 26.

Even assuming that the order was in excess of authority, it would not affect the legality of the subsequent capture. The remedy would be by action after the war against the official responsible for the act. The vessel, however, was free to leave for several hours before and after Falmouth became an enemy port, and as she took no steps to leave the inference is that she had no intention of doing so.

Aspinall, K.C., and *C. R. Dunlop*, for the claimants. The vessel is within the protection of Convention VI., arts. 1 and 2, and should not be confiscated ; and under the special circumstances of the case she should be restored to her owners forthwith. The vessel was engaged in an ante-bellum commercial adventure undertaken in good faith, and in pursuance of that adventure took refuge in a neutral port. The fact that whilst lying there war broke out with

(1) Hague Conference, 1907, Convention VI., art. 1 : " When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated in it.

" The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has

entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Art. 2 : " A merchant-ship, which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

(2) (1915) 1 Br. & Col. P. C. 303.

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Great Britain whereby the port became an enemy port constituted a "surprise of war" within the meaning of the preamble to Convention VI. After a mistake had been made by the authorities in detaining the vessel they intended to let her go free, and the Prize Court ought not to take advantage of a mistake which possibly resulted in the vessel being still in port on the outbreak of war with this country.

Sir Frederick Smith, A.-G., in reply. All British vessels in German ports were detained at least four days before the outbreak of war with Great Britain : Parl. Miscel., No. 10, 1915, pp. 96 and 103 (Collected Diplomatic Documents relating to the Outbreak of the European War) ; and, as appears from *Beal v. Horlock* (1), British vessels are still being detained. The *Prinz Adalbert* was treated with much greater indulgence than Germany has shown towards British vessels, she failed to take advantage of it, and should be condemned.

SIR SAMUEL EVANS, PRESIDENT. The steamship *Prinz Adalbert*, belonging to the Hamburg-Amerika line, was, at the beginning of August, 1914, on a voyage from Philadelphia to Hamburg with a cargo of general goods. She was seized in Falmouth Harbour.

The claim made on behalf of the owners of the vessel is that she should be absolutely released from seizure, or, in the alternative, that, at any rate, she should not be subject to confiscation but only to detention during the war on condition of being delivered up at the end of the war, or that compensation should be paid if she is not so delivered up.

For the purpose of this case, and only for the purpose of this case, I assume that the Sixth Convention of the Hague Conference of 1907 is binding. That has been done in other cases. There has not been a final decision upon the matter in this country yet, although it has been elaborately argued recently before the higher tribunal.

The question arises, therefore, whether this vessel was in Falmouth in circumstances contemplated by the Sixth Convention, and in circumstances the existence of which would give her the privilege of the provisions of arts. 1 and 2 of the Convention.

The facts are not to any great extent in dispute, and therefore the statement I will make of them need only be short. On August 3,

(1) [1915] 3 K. B. 203, 627 ; [1916] A. C. 486.

the day before war was declared between this country and Germany, the *Prinz Adalbert* was approaching the English Channel. The master, soon after the ship passed the Scilly Isles, learned that a state of war existed between France and Germany. Having heard that, the master, according to the affidavit which he made and according to the protest which he made on August 8, decided to proceed to a neutral port. In the one, he said he decided to do that for orders, and in the other he said he did it so that his ship might be in a port of refuge. This case was before me on December 6, and then was adjourned for further evidence to be given as to what had taken place. Now, as the Attorney-General has pointed out, it is the fact that on December 6 nothing was said by or on behalf of any claimant, either verbally or in writing, to the effect that the reason, or indeed a reason, for the ship's proceeding into Falmouth was a desire to comply with the wishes of the passengers. Yesterday the Court heard for the first time from the viva voce evidence given by the master that a deputation from the passengers, consisting chiefly of Americans and Germans, waited upon the master and requested him to take the vessel to an English port, so that they, Americans and, strange to say, Germans too, might not proceed on their voyage to Hamburg, but might return from England to American soil. I do not know what took place, but the master cannot blame the Court for coming to the conclusion that that statement with regard to the deputation of passengers, and particularly the statement that he only went into Falmouth by reason of the request of that deputation, is an afterthought.

I do not forget that in the postscript to the letter to the senior naval officer at Falmouth there is a reference to a desire to land passengers and take in coal. That is perfectly consistent with the original story of the master, which was that he went into Falmouth for orders or for refuge. When he got there I dare say there may have been a request from the passengers, or some of them, that they might be allowed to land; and there may have been a request by the master to take coal on board, because he might receive orders, or decide to proceed to Hamburg, not through the English Channel in the ordinary way, but through the Irish Channel and round the north of Scotland.

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On August 4 the vessel was told that she must not leave the port. That might be regarded as an embargo, and I think the authorities were quite within their rights, if there were any anticipation of possible war at that time, in telling this vessel that she must not leave the port. If nothing else had been done, when a state of war came to exist the vessel would have had to remain in the port as if she had been under an embargo. Another circumstance, however, intervened, which I think makes that unimportant—namely, that after the detention by the Customs officer, permission was given on August 4 by the fortress commander, acting on instructions from the Admiralty, for the vessel to leave. Indeed, the steps taken by the fortress commander, and communicated to the German Consul and afterwards to the vessel, were in my opinion something more than a permission to leave. They were in effect an intimation that the vessel had no right to use the port, that now was the opportunity for clearing out, and that she must leave. Nevertheless the vessel remained there until after the outbreak of war with Great Britain.

A state of war existed from 11 o'clock on the evening of August 4, and the *Prinz Adalbert* was arrested on the morning of August 5. If the vessel was allowed to leave, or it was intimated to her that she must leave, about 4 o'clock in the afternoon of August 4, I do not think she would have a right to rely in any event upon the Hague Convention. She had no right to call on the authorities there to allow her to remain to see what might happen. They had full right to tell her that she must leave the port.

What was done by the master? I find no indication whatever in the evidence or the affidavits that he ever intended to avail himself of the opportunity of leaving or to obey the order to take his vessel out of the port. He says in his affidavit that it would take twelve hours to raise steam. I dare say that it would, but if he had intended to go he could have raised steam in the time at his disposal. Nothing whatever was done to show that he was preparing to take his departure. On the contrary, I am satisfied beyond all doubt that the master never intended to avail himself of the permission. What would have been the result if he had? I find that he went into this port in order to avoid the risk of being captured by French cruisers. If he had left on the afternoon of

August 4, or on the morning of August 5; that risk would still be staring him in the face. Indeed, as it turned out there would be further risk after 11 o'clock on the night of August 4 that somewhere on the seas between Falmouth and Hamburg his ship might be captured by a British cruiser.

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Having intended to avoid the first of these risks by entering the port, he further intended to remain in the port, to avail himself of a port of refuge. No doubt the time was short, as we know the facts now—from 4 o'clock until the declaration of war at 11 o'clock—but, as I put it to the master in the box, he did not know that war was to be declared as from 11 o'clock that night. Moreover, I have no hesitation in saying that if the master had shown any signs or expressed any wish to leave the port after the permission had been given, and had so told the authorities, even at 11 o'clock, when war was declared, saying he had not had sufficient time, and would like more time, the authorities, in order to complete the permission given at the outset for leaving, would have said that it was only fair that he should have a reasonable time for getting his vessel fully ready. Nothing was done, for the reason that, as I have stated, the master of the vessel made no attempt and showed no disposition to leave Falmouth Harbour.

The preamble of Convention VI. shows what was its object. It states that the contracting parties, "anxious to ensure the security of international commerce against the surprise of war, and wishing, in accordance with modern practice, to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect." As I stated in *The Belgia* (1), in my view that provision was made in the interest of commerce. Now this vessel was not in the port of Falmouth pursuant to any commercial undertaking at all. The object was not to take part in a commercial operation, but a totally different one, and one not contemplated by the provisions of the Sixth Hague Convention. That Convention was not in my opinion intended to provide any protection for vessels using a port either for refuge from capture by a belligerent, or for procuring orders from any other belligerent or its subjects.

In these circumstances I have come to the conclusion that my

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duty is to condemn this vessel as enemy property in favour of the Crown. I am informed that the vessel has been requisitioned, and therefore she will now be handed over to the Crown as prize.

Security for appeal, 300*l*.

Solicitor for the Procurator-General: *The Treasury Solicitor*.

Solicitors for claimants: *Stokes & Stokes*.

E. C. T.

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Dec. 3.

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March 27.

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

THE BENUE.

[1915, fol. 276.]

Ship—Collision—Damage—Compulsory Pilotage—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633—Contributory Negligence of Master and Crew—Onus of Proof.

In an action of damage by collision, in which the defence of compulsory pilotage is pleaded, the onus probandi lies, in the first instance, on the plaintiffs to establish a case of negligent navigation on the defendants' ship. The defendants must then prove that a compulsory pilot was in fact in charge; that the negligent navigation was due solely to the fault of the pilot—that is to say, that the particular negligent acts or defaults found by the Court to have caused the collision were committed by the pilot himself, or by the master and crew in obedience to the pilot's orders; and if, in addition, evidence is adduced by the plaintiffs, or obtained from the defendants' own witnesses, or is in any other way forthcoming, that there were also acts or defaults on the part of the master or crew which might have contributed to the collision, the defendants must further satisfy the Court that such acts or defaults did not in any degree contribute to the collision.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Ravenstone*.

The defendants were the owners of the steamship *Benue*.

On March 1, 1915, about a quarter past six in the afternoon, the *Ravenstone* (a steel screw steamship of Newcastle-on-Tyne, of 3049 tons gross register, with engines of 230 horse power nominal,

manned by a crew of twenty-five hands, and in charge of a licensed Liverpool pilot) was in the river Mersey about off Seacombe in the course of a voyage from Galveston to Liverpool with a cargo of cotton. The weather was clear, the wind about north-north-west, a moderate gale, and the tide about low water. The *Ravenstone* was proceeding straight up the river on the west side of mid-channel with engines working slow, when the *Benue* (a screw steamship of 3123 tons gross register, engines of 320 horse power nominal, manned by a crew of forty-six hands, and proceeding up the Mersey to the west of mid-river at a speed of about ten knots, in the course of a voyage from West African ports to Liverpool) was observed coming up astern, and gradually overtaking the *Ravenstone*, and, according to the plaintiffs, while passing on the starboard hand, began to sheer to port as if acting under starboard helm, thereby causing danger of collision. The engines of the *Ravenstone* were stopped, and, as soon as her port bow was passed and clear of a vessel lying at anchor with her head to the westward, the helm of the *Ravenstone* was put hard-a-starboard, and her engines full speed astern; but the *Benue* with her port side about amidships struck the starboard bow of the *Ravenstone*, causing damage.

The charges of the plaintiffs were: that a good look-out was not kept on board the *Benue*; that she neglected to keep out of the way of the *Ravenstone*; that the helm of the *Benue* was improperly starboarded and/or her head allowed to come to port; and that her engines were not eased, stopped, or reversed.

The defendants denied that they or their servants had been guilty of any negligence in the navigation of the *Benue*, or that the collision was thereby occasioned, and the defendants said that the collision was solely caused (or, in the alternative, was contributed to) by the negligent navigation of the *Ravenstone*, which vessel they alleged, shortly after passing Seacombe landing stage, was observed to be sheering towards the *Benue* as if under port helm. A collision appearing inevitable, the helm of the *Benue* was put hard-a-starboard and the engines stopped; but the *Ravenstone* with the bluff of her starboard bow struck the port quarter of the *Benue*, causing damage, and the defendants averred that those in charge of the *Ravenstone* were negligent in failing to keep a good look-out,

1916 improperly porting and/or allowing the head of the *Ravenstone*
THE BENUE. to come to starboard, failing to keep their course and speed, and
failing to indicate their course by whistle.

The defendants further said that if the collision was caused or contributed to by any negligent navigation or management of the *Benue* (which was denied), it was so occasioned solely by the fault or neglect of a duly qualified pilot for the district in charge of the *Benue* by compulsion of law.

1915. Dec. 3. *Laing, K.C.*, and *D. Stephens*, for the plaintiffs.
Bateson, K.C., and *A. Hyslop Maxwell*, for the defendants.

The learned President, who was assisted by two of the Elder Brethren of the Trinity House, found that the plaintiffs' vessel—which was being overtaken by the defendants' vessel—kept her course and speed, and that the defendants' vessel ran into the plaintiffs' vessel, and so caused the collision.

The consideration of the defence of compulsory pilotage was reserved.

Cur. adv. vult.

1916. March 27. THE PRESIDENT (SIR SAMUEL EVANS). At the conclusion of the trial, to avoid delay, I stated my decision on the facts, and I have now to deal with the defence of compulsory pilotage which was raised by the defendants. For this part of the judgment it is not necessary, fortunately, to recapitulate many facts. It is sufficient to state the main contests and conclusions.

The substance of the plaintiffs' case was (1.) that the *Benue* neglected to keep out of the way of their vessel, the *Ravenstone*, and (2.) that the helm of the *Benue* was improperly starboarded, and/or her head was improperly allowed to come to port, so as to cause the collision.

The substance of the defendants' case was (1.) that the *Ravenstone* was improperly ported, and/or her head was improperly allowed to come to starboard, and (2.) that the *Ravenstone* failed to keep her course and speed.

The cause of the collision was the faulty navigation of the *Benue*. She was the overtaking vessel, and she failed to keep out of the

way of the *Ravenstone*. Her head was improperly driven to port and into the *Ravenstone* by improper starboarding. On the other side the helm of the *Ravenstone* was not ported, and her head was not allowed to go to starboard. Her course and speed were properly kept. The *Benue* had a compulsory pilot on board. General evidence was given that he gave the navigation orders, and that his orders were obeyed.

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The important general question is what kind of evidence and proof must the owners of a vessel give in order to entitle them to the immunity afforded by the Merchant Shipping Act in cases of faulty navigation where pilotage is compulsory. In many, if not most, of the cases of this class which come before the Court, the disputes relating to the immunity involve personal reputations and responsibilities, as well as large sums of money. The reported authorities have dealt with the question in the main as one of onus of proof. I will not discuss the older cases. It will suffice for the purpose of this judgment to examine those which have been decided during the last half-century, since the passing of the Merchant Shipping Act, 1854.

The first of this series of cases is *The Schwalbe*. (1) The cause to which the collision was attributed was an improper starboarding of the helm. The owners failed to prove expressly that the order to starboard was given by the pilot. For that reason they were deprived of the immunity, and were held liable. Lord Chelmsford delivered the judgment of the Judicial Committee, and in dealing with this matter said :

“ The *Schwalbe*, therefore, being found to be in the wrong, it only remains to be considered whether the owners have succeeded in exonerating themselves from their prima facie responsibility, by showing that the pilot was the sole author of the injury. For this purpose it is not sufficient for them to prove the vessel to have been in charge of a licensed pilot, under whose orders the crew were acting, and then to call upon the Court to presume that the particular order which occasioned the collision was given by him. By the express words of the 388th section of the Merchant Shipping Act, which protects the owners from loss or damage where it is occasioned by the fault of the pilot, the onus probandi lies upon them, as their

(1) (1861) 14 Moo. P. C. 241, 249.

1916 Lordships decided in the case of *The Christiana* (1), upon corresponding words in the former Pilot Act (6 Geo. 4, c. 125). It has
 THE BENUE. been shown, in the consideration of the circumstances of the collision, that it must have been occasioned by the *Schwalbe* having
 The President. starboarded her helm a short time before it occurred. The owners, to relieve themselves from their liability, are bound to prove that an order to starboard the helm at this time was given by the pilot. But no such proof is anywhere to be found, except in the hasty expression (corrected, as the witness says, almost before the words were out of his mouth, and not acted upon) just at the moment of the collision. The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves."

The members of the Committee present at the hearing were Lord Chelmsford, Lord Kingsdown, and Sir Edward Ryan.

This decision was cited with approval in the judgments of the Privy Council in the two cases next to be referred to, namely, *The Iona* (2) and *The Velasquez*. (3) It is not mentioned in the opinions of the Law Lords in the *Clyde Navigation Case*. The arguments are not reported, but I cannot doubt that *The Schwalbe* (4) was there cited; moreover, Lord Chelmsford, who had delivered the judgment in it, presided in the Lords in the *Clyde Navigation Case*. (5)

The next decision to be examined is *The Iona* (2), on appeal to the Privy Council from Dr. Lushington as judge of the High Court of Admiralty. Upon the question of what the owners had to prove in order to make good the defence of compulsory pilotage, Sir Richard Kindersley (formerly Vice-Chancellor), who delivered the judgment, defined the position as follows:

"It has been established as a principle that, in order to entitle the owners to the benefit of exemption from liability, . . . they must prove that the damage, for which it is sought to make them liable, was occasioned exclusively by the default of the pilot. It is not enough for them to prove that there was fault or negligence in the pilot, they must prove, to the satisfaction of the Court, which has to try the question, that there was no default whatever on the

(1) (1850) 7 Moo. P. C. 160.

(3) (1867) L. R. 1 P. C. 494.

(2) (1867) L. R. 1 P. C. 426, 432.

(4) 14 Moo. P. C. 241.

(5) (1876) 1 App. Cas. 790.

part of the officers and crew of their vessel, or any of them, which might have been, in any degree, conducive to the damage."

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This passage was criticized in the *Clyde Navigation Case* (1), not with regard to the statement as to the necessity for proof by the owners of the fault of the pilot, but only to the implication in the three words I have italicized above as to the subsequent proof of fault on the part of the officers and crew which would exclude the conclusion that the damage was attributable solely to the pilot's negligence. Upon this Lord Chelmsford said (after citing the passage from "It is not enough," &c., to the end) :

"The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If, instead of saying 'they must prove,' &c., he had said, 'it must be proved that there was no fault on the part of the officers and crew,' he would then have been perfectly correct": *Clyde Navigation Co. v. Barclay*. (1)

Subject to this criticism, therefore, the passage above quoted was approved of by the Law Lords. The members of the Committee who sat with Sir Richard Kindersley were Lord Romilly M.R. and Sir James Colvile.

A few months afterwards the decision in *The Velasquez* (2) was given. It was delivered by Sir James Colvile. In it the principle under discussion is stated thus :

"It has been established by a long course of decisions, both in the High Court of Admiralty and at this Board, that to entitle the owners of a ship which is under the charge of a licensed pilot to the benefit of the provision in the Act which exempts them from liability where the collision has been occasioned by the fault of the pilot, it lies upon them to prove that it was caused *solely* by his fault."

He afterwards pointed out that the authorities further showed that if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them. Then follows a passage as to the burthen of the further proof where there is evidence of negligence on the part of the master and crew, which

(1) 1 App. Cas. 792.

(2) L. R. 1 P. C. 497, 499, 500.

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 The President. part of *The Iona* (1) judgment, and to be in line with the subsequent
 opinions expressed by the House of Lords. The passage reads
 thus :

“ If, however, the evidence shows that there were acts of negligence on the part of the master and crew which may have contributed to the accident, as well as fault on the part of the pilot, the duty of showing that the former did not contribute in part to the accident seems to be involved in the obligation of the owners to prove that the *causa causans* of the collision was exclusively the fault of the pilot.”

In this judgment there is one other passage which I deem it useful to quote :

“ If the crew and the pilot have combined consciously to put forward a false case, all that can be said is that the owners have failed to show, by trustworthy evidence, that the fault was exclusively the fault of the pilot. But if it be assumed, as their Lordships would willingly assume, that the witnesses honestly mistook the position of the barque, the natural inference from that is, that if there had been a proper look-out, not only would the barque have been descried at a greater distance, but her true position would have been known.”

This is the part of the judgment apparently which was mainly in the mind of Sir Gorell Barnes when he stated the principle in *The Benmohr*. (2)

In *The Velasquez* (3) the faulty act of the pilot, namely, star-boarding the helm, was proved by the owners, and was held to be a dangerous and improper manœuvre, and the immediate cause of the collision; but it was held that blame attached also to the crew, so that the defence of compulsory pilotage failed. It is a little curious that this decision, following after *The Iona* (1), was not adverted to in the *Clyde Navigation Case*. (4) The members who constituted the Committee were Sir William Erle C.J., Sir James Colvile, Sir Edward Vaughan Williams, and Sir Richard Kindersley.

The case of the *Clyde Navigation Co.* (4) comes next. Lord

(1) L. R. 1 P. C. 426.

(3) L. R. 1 P. C. 494.

(2) (1904) 52 W. R. 686, 688.

(4) 1 App. Cas. 790, 792, 795, 796.

Chelmsford (having stated that there had been some little confusion in the cases as to the onus probandi, and having made the criticism already mentioned upon what Kindersley V.-C. said in *The Iona* (1)) stated the law in these terms :

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“ The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions of part of the crew may come out ; and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident.”

Lord Hatherley stated the rule thus :

“ I apprehend that the true rule is that the mode of proof will be this : In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute ; and the burden is, therefore, thrown upon you of proving that the mischief was occasioned by the pilot. But the other side may prove that, although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident.”

It appears to me, speaking with all deference, that the ex-Lord Chancellor, in the last sentence, failed to distinguish between the separate burdens of proof to be borne at this stage of the proceedings by the plaintiffs and the owners of a piloted vessel. His words seem to suggest that the former have the burden of establishing acts or omissions of the crew. But for this last sentence of Lord Hatherley's, I should not cite from the judgment of Lord Selborne, as he appears to me to express at much greater length what the judgment of Lord Chelmsford had succinctly stated. But in view of

(1) L. R. 1 P. C. 426.

1916 Lord Hatherley's language it might be useful to make the following

THE BENE. quotation from Lord Selborne's speech :

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" My Lords, I see no reason for inferring the existence of any special or peculiar principle applicable to the burden of proof in this class of cases.

" Your Lordships will observe that there are three things necessary to be proved : first, that a qualified pilot was acting in charge of the ship ; secondly, that that charge was compulsory ; and thirdly, that it was his fault or incapacity which occasioned the damage.

" I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or showed some incapacity, by which loss or damage were occasioned, yet there were also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to show that. I apprehend it is clear on general principles that the burden of laying that foundation rests upon the pursuer, and not upon the defender. The defender if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the onus lying upon him in that respect either by direct proof tendered by himself, or by shewing that in the proofs brought forward on the part of the defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further onus probandi is thrown upon the defender to rebut the prima facie evidence which has been given of contributory negligence on his part.

" Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which

those expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principles of onus probandi as applied to this particular class of cases."

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This case was considered by the Court of Appeal in *The Indus*. (1) In my humble view the summary explanation of the case given by the Master of the Rolls is not complete or satisfactory. In this, and in his own judgment, Lord Esher introduces the element of prima facie proof when considering what the owners of the piloted ship have to establish to entitle them to exemption from liability.

"If" (he said) "the defendants prove that the pilot gave orders and that they were obeyed, they make out a prima facie case of negligence on his part."

The description he had just previously given, as to the extent of the control of the pilot, would seem also to be too restricted, if it was intended to apply generally. The sentence above cited is so general that it is not unlikely to cause misconception. Evidence is always given formally in cases of this kind that the pilot gave all the orders and that they were all obeyed. I think that Lord Esher must have meant to refer, not to general evidence of that kind, but to proof of particular, specific orders, given by the pilot, the obedience to which brought about the accident. I have examined this case, as it has been said that the decision in the *Clyde Navigation Case* (2) was explained in it.

I refer, in passing, to the case of *The Schwan* (3) only for a short passage from the judgment of Bowen L.J. After stating that the owners of the ship have to show that the collision was due wholly to the pilot and not to their own crew or master, he adds:

"It will not do to shew that the pilot was in fault, unless they can shew that the pilot only was in fault, and that some act of negligence on his part, apart from the master and crew, caused the accident."

The last decision I propose to refer to is that of Barnes J. in *The Benmohr*. (4) It has already been mentioned in connection with a passage cited above from *The Velasquez*. (5) Barnes J. deals with the matter thus:

"Then comes the principle applied in the case of *The Velasquez*. (5)

(1) (1886) 12 P. D. 46, 48.

(3) [1892] P. 419, 441.

(2) 1 App. Cas. 790.

(4) 52 W. R. 688.

(5) L. R. 1 P. C. 494.

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A short statement of that principle may be thus put: That the persons—in this case the defendants—who rely on the plea of compulsory pilotage, must prove by trustworthy evidence that the fault was the fault of the pilot alone, otherwise the Court cannot act in finding that the fault was that of the pilot. It appears to me here that the defendants have failed to satisfy me, by trustworthy evidence, as to what occurred in fact on board the ship, that the fault was that of the pilot alone.”

From these authorities I think it follows that the position in an action of collision as between plaintiffs on the one hand and defendants pleading the defence of compulsory pilotage on the other hand may be set out in plain and practical language in this way.

The plaintiffs must first establish a case of negligent navigation on the defendants' ship. The defendants must then prove that a pilot was in charge compulsorily and in fact; that the negligent navigation was due solely to the fault of the pilot; that is to say, that the particular negligent acts or defaults, found by the Court to have caused the collision, were committed by the pilot himself, or by the master or crew in obedience to the pilot's orders. If the case rested in that state, the defence of compulsory pilotage would prevail. But if, in addition, evidence is given, either adduced by the plaintiffs, or obtained from the defendants' own witnesses, or in any other way forthcoming in the course of the case, that there were also acts or defaults on the part of the master or crew which might have contributed to the collision, the defence would fail, unless the defendants satisfied the Court that such acts or defaults did not in any degree contribute to the collision. If the defendants did satisfy the Court of that, their defence would hold good; if they did not, their defence would fail.

The issues which according to these rules arise are sometimes confused by contentions that the defendants have put forward a case either false, or ill founded, and that therefore their defence of compulsory pilotage ought not to succeed. Parties who put forward such cases suffer by the weakening or discrediting of their evidence, which may materially affect the findings upon the issues involved; but the legal issues remain the same. If in every case where the defendants put forward a case to account for a collision which does not commend itself to the Court they must

fail in their compulsory pilotage defence, the defence would indeed have a scanty record of success.

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The duty of the Court is to try to ascertain the real facts in each case, and apply to them the legal rules. The application of the rules to the present case upon the facts found is simple. I have found that the collision was due to the improper starboarding of the *Benue*. The defendants, so far from proving that this starboarding was the sole fault of the pilot, denied in their pleadings and by their evidence that such starboarding ever took place. They accordingly did not prove, or even set out to prove, that the act which is found to have caused the collision was the act of the pilot. This puts an end to their defence of compulsory pilotage.

In order to further illustrate the rules applicable to such cases, I may add that if the defendants had admitted or proved the starboarding of their ship by the order of the pilot, but had also tried to prove, as they had alleged, that the *Ravenstone* had improperly ported and had so brought about the collision, or had changed her course and speed, they would not necessarily have lost the benefit of their defence.

But again, supposing they admitted or proved the starboarding by the order of the pilot, if it transpired in the course of the evidence that the starboarding exceeded the pilot's orders or was continued, contrary to such orders, by the fault of the man at the wheel, the defendants would have failed in their defence unless they satisfied the Court that such excess or continuance of the starboarding did not in any degree contribute to the collision. If they had so satisfied the Court they would succeed.

For the reasons before stated, I decided that the defence of compulsory pilotage failed, and ordered judgment to be entered for the plaintiffs.

Solicitors for plaintiffs : *Thomas Cooper & Co.*

Solicitors for defendants : *Lawrence Jones & Co., for Forwood & Williams, Liverpool.*

T. L. M.

1916

March 20;
April 3.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.

(IN PRIZE.)

THE PONTOPOROS.

[1915 C. 1734.]

Prize Court — Salvage on Recapture — Neutral Vessel — Capture by Belligerent Cruiser—Liability to Destruction or Condemnation—Recapture by British Cruiser—Principles on which Prize Salvage will be awarded.

By the law of nations, the general rule is that no salvage is due for the recapture of a neutral vessel, upon the principle that the liberation of a bona fide neutral from the enemy confers no benefit upon the neutral, inasmuch as the enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized. But where the vessel recaptured was practically liable, whether rightfully or wrongfully, to be confiscated by the enemy, salvage will be awarded to the recaptors.

Thus, where a German cruiser had captured a Greek vessel laden with a cargo of coal belonging to British merchants and destined for the North Western State Railway of India on the ground that she was carrying contraband, and the vessel was recaptured by a British cruiser, the Court, being of opinion that the recapture saved the vessel from condemnation in any German prize proceedings or from the almost certain risk of destruction if dealt with by the captors on the high seas, awarded to the recaptors as prize salvage one-sixth of the vessel's value, 7333*l*.

CLAIM for prize salvage on the recapture of a neutral vessel from an enemy captor.

The plaintiffs were Henry Lake Cochrane, captain of His Majesty's ship-of-war *Yarmouth*, and her crew. The defendants were the owners of the Greek steamship *Pontoporos*.

On September 10, 1914, the *Pontoporos*, a screw steamship of 4049 tons gross register, bound from Calcutta to Karachi with a cargo of coal belonging to British merchants and destined for the North Western State Railway of India, was captured by the German cruiser *Emden*, and a prize crew was put on board. The

ground of seizure was that the *Pontoporos* was carrying contra-band of war for the British Government.

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On October 12, while coal was being transferred from the *Pontoporos* to the *Markomannia*, a supply ship to the *Emden*, the *Pontoporos* was recaptured a few miles off Simalur, a Dutch island off Sumatra, by H.M.S. *Yarmouth*, a light cruiser of 5250 tons displacement with a complement of 393 officers and men.

The *Pontoporos* was taken to Penang and thence to Singapore, and proceedings were brought against her in the Colonial Court of Admiralty of the Straits Settlements for her condemnation as prize on the ground of unneutral service. (1) These proceedings resulted in the vessel being restored to her owners, subject to bail being given to answer any salvage claims, and the proceeds of the sale of her cargo were ordered to be paid out to the British owners thereof, less one-eighth deducted under s. 40 of the Naval Prize Act, 1864, as prize salvage.

The present proceedings were instituted by the issue of a writ in rem for salvage under the Admiralty jurisdiction of the Court, and pleadings were delivered according to the practice in Admiralty, but in the course of the hearing the learned President, who was assisted by Trinity Masters, said that the action had better be treated as transferred to the Court's jurisdiction in prize.

Laing, K.C., and *Lewis Noad*, for the plaintiffs.

Dawson Miller, K.C., and *D. Stephens*, for the defendants.

In the course of the arguments, which sufficiently appear from the judgment, counsel for the plaintiffs referred to *The War Onskar* (2), *The Eleonora Catharina* (3), *The Carlotta* (4), *The Huntress* (5), the decision of the German Prize Court in *The Maria* (6), and arts. 21, 41, and 113 of The Prize Code of the German Empire (Eng. Trans. by Huberich and King). (7)

Cur. adv. vult.

(1) (1915) 1 Br. & Col. P. C. 371.

(2) (1799) 2 C. Rob. 299; 1 Eng. P. C. 239.

(3) (1802) 4 C. Rob. 156; 1 Eng. P. C. 367.

(4) (1803) 5 C. Rob. 54.

(5) (1805) 6 C. Rob. 104.

(6) (1915) Hanseatische Gerichts-zeitung, April 17; see 59 S. J. 724.

(7) Art. 21: "List of absolute contraband. . . . No. 21. Coal and coke."

Art. 41: ". . . . A vessel

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1916. April 3. SIR SAMUEL EVANS, PRESIDENT. This is a claim for prize salvage on the recapture of a neutral ship from an enemy captor.

The claim is made by the captain and crew of H.M.S. *Yar-mouth*. It is made with the approval of the Lords Commissioners of the Admiralty. The ship recaptured was the *Pontoporos*, a steamship belonging to the port of Andros in the kingdom of Greece. She was the property of a Greek company. Her value is 44,000*l*.

This is the first case in which proceedings for prize salvage have been taken in the course of the present war. The claim is made only against the owners of the vessel, and not against the cargo owners.

By the law of nations the general rule is that "no salvage is due for the recapture of neutral vessels . . . upon the principle that the liberation of a bona fide neutral from the hands of the enemy . . . is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized": Wheaton's International Law, 8th ed. by Dana, s. 364. To this general rule, however, an important exception has been made for over a century, in the case where the vessel recaptured was practically liable to be confiscated by the enemy, whether rightfully or wrongfully. Lord Stowell explains the foundation of the rule, and the ground of the exception, in the following passage in his judgment in *The Sansom* (1):

"It is unnecessary to repeat that the general practice of this

captured for the carrying of contraband is subject to condemnation, if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

Art. 113: "Where a neutral vessel has been captured . . . for carrying contraband . . . the commander may destroy the same, provided that: (a) the vessel is subject to condemnation, and, in addition thereto, (b) the bringing

into port would subject the war vessel to danger, or be liable to impede the success of the operations in which it is at the time engaged. Among other circumstances, this may, *inter alia*, be assumed to be the case, if: . . . (β) the vessel cannot follow the war vessel, and is therefore liable to recapture; or (γ) the proximity of the enemy forces gives ground for a fear of recapture."

(1) (1807) 6 C. Rob. 410, 413.

Court is not to decree salvage on neutral ships recaptured, upon the presumption that no peril had been incurred, but that, on being carried into the Courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every state which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if states hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose, that they will be carried into execution. The reasoning on which the general rule had been founded is then done away with; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation."

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This exception had been stated by Lord Stowell in earlier cases, and has been generally recognized since that time: see Wheaton's International Law, 8th ed. by Dana, s. 366, and Wildman's International Law, vol. 2, p. 286.

It appears to me that other circumstances may be conceived as creating other exceptions to the general rule. I only state this lest it might be supposed that the Court would only have regard to the exception above mentioned. But this latter is the only one which need be considered in the present case. Does the general rule, or the exceptional rule, apply to the facts of this recapture?

The recaptured ship started from Calcutta on September 5, 1914, on a voyage to Karachi, laden with about 6000 tons of coal, consigned by British merchants at Calcutta to British merchants at Karachi. In the early morning of September 10 she was captured by the German cruiser *Emden* in the Bay of Bengal. A German prize crew was put on board. An entry recording the search and capture was made in the log book by the prize officer. It reads as follows:

"Sept. 10, 1914.

"2.30 A.M., Gulf of Bengal, 10' 22" N. lat., 84° East long. The Greek steamer *Pontoporos* has been seized by order of the commander of the German cruiser S.M.S. *Emden*, because in accordance with her charterparty she was to convey contraband of war (coal) for the British Empire from Calcutta to Bombay or Karachi. No manifest or (indecipherable word) were found on board. The

1916 captain was aware of the war between Germany and England.
 THE The captain offered no objection to seizure and search.
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“F. Lauterbach,
 1st Lieutenant, Prize Officer,
 S.M.S. *Emden*.”

After some conversation with the captain, the prize officer proceeded to placard in various places in the ship a notice in German, English, and French.

The English version was as follows :

“NOTICE.

“During the occupation of this ship by a detachment from a German man-of-war, the ship’s crew and passengers are subject to German martial law.

“Whosoever forwards the interests of Germany’s enemies or harms the German Navy during the occupation incurs death.

“During this time every offence and every neglect of orders and directions issued on this ship will be punished according to the penal law of the German Empire.

“Moreover, every hostile movement or even the attempt of such an action by any of the crew or passengers may have the most serious consequences for the whole ship, crew and passengers.

“All arms and ammunition must be handed over immediately. Whosoever will be found to be in possession of arms or ammunition in the course of half an hour will be arrested and punished according to the law.

“Everybody of the ship’s crew is obliged to attend to his usual work until he is dismissed or expressly released therefrom.”

It is as well to give the account of these and subsequent events in the words of the captain of the *Pontoporos* himself.

On December 3 he wrote from Singapore to his owners a letter translated as follows (1) :

“Dear Sirs,

“As you are doubtless aware, five days after our departure from Calcutta, and on Sept. 10, 2.30 A.M., we were seized by the German warship *Emden*, lat. 10.25 N. and long. almost 84 E.

(1) The original was presumably not answerable for the accuracy in Greek ; the reporter is of course or the English of the translation,

“As soon as the Germans came on board, about 25 to 30 of them, that is two officers, one engineer, and the others, sailors, all fully armed with Mannlicher fusils and revolvers, carrying in the same time five to six cases of cartridges and different explosives, and after they took and examined all the documents on board, declared to us that the cargo belonging to British merchants, and in view of the state of war existing between Germany and England, same is considered as contraband of war, and consequently it will be seized and be used by the warship.

“I have protested repeatedly to them saying that the steamer belongs to a neutral nationality and that she was fixed before the declaration of war, &c., but to no avail. Seeing after all that any further resistance on my part would be fruitless and very probably dangerous, I was obliged to yield.

“They proposed whether I agree to stay on board our steamer with the crew and continue to perform the usual work on the steamer well, otherwise they (the Germans) would be obliged to remove us on board the warship and bring on board our steamer their own crew, and finally, when they would have taken all what they need out of the cargo of the steamer, they would sink her necessarily, having no port where to bring her for safety and consequently save her from the necessary sinking.

“I have considered it my duty therefore, and in accordance with my crew accepted to stay on board our steamer until her release and salvage. Their first steps after our acceptance was to declare the German martial law, which they placarded in the steamer, to take all the steamer's documents generally, weapons, and money which amounted to 50*l*. When I told them it was my own money they returned same to me.

“German officers armed have taken command of the ship afterwards, and a detachment of 15—20 armed men have been settled on the lower bridge, and who guarded the steamer alternately, especially the engine and boiler rooms, up to the end of our capture.

“We followed the warship up to the 16th of the same month, and in the meantime she had sunk many British steamers, and in the morning of the 16th she came alongside and bunkered out of our cargo 500—600 tons, and then she left us. The Germans

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1916 on board our steamer conducted her towards the island of Simulu,
THE where, apparently, the warship would have come later. We stayed
PONTOPOROS. there under steam up to Oct. 6, when the German cargo boat
The President. *Markomannia* came, in order to take as much as she could from
our cargo up to the 13th same month, when she would have released us, as, as we understood, the warship met an English steamer laden with Welsh coals, and which she captured in preference, and kept her in order to bunker from her.

“ I cannot describe how I suffered all this time through oppression, sorrow, famine, brutal treatment of the Germans, and the daily rioting among the crew for food, as the provisions which the Germans had in their possession had been nearly exhausted, and all the time I was fearing that the crew, exasperated, would by force try to take a little food. This terrible state of affairs lasted up to Oct. 12, the eve of our release from the Germans, when suddenly appeared the British warship *Yarmouth*, which, after she had sunk the *Markomannia*, took us to Penang, and thence to Singapore. This is all about our capture by the *Emden*.”

It will be observed that from her capture on September 10 the *Pontoporos* was kept in attendance upon the *Emden* or her supply ship *Markomannia* until October 12—a period of nearly five weeks. During a part of this time, for ten or twelve days or more, the captain had been imprisoned or confined in his cabin, according to his statement to Lieutenant Edelston. He and his crew had been in turn threatened, bribed, or cajoled into working according to the orders of the prize crew.

On October 12, when sighted by H.M.S. *Yarmouth*, the *Pontoporos* was lashed alongside the *Emden's* supply ship *Markomannia*, to which some of the cargo of coal was being transhipped.

As to what happened on and after the approach of H.M.S. *Yarmouth*, the following facts were admitted by the defendants in their pleadings :

“ At about 6.10 A.M. of October 12, 1914, those on board H.M.S. *Yarmouth*, being in about lat. $2.53\frac{1}{2}$ N. and long. 96.6 E., while patrolling the north coast of Sumatra, sighted the *Pontoporos*, lashed alongside the German steamship *Markomannia*. The *Yarmouth* at once bore down upon the vessel, and it was seen that the *Markomannia*, which vessel was acting as supply ship to

the German cruiser *Emden*, was taking in coal from the *Pontoporos*. As the *Yarmouth* approached, the *Markomannia* cast off and attempted to escape to territorial waters, but was stopped by a shot fired across her bows by H.M.S. *Yarmouth*. At 7.5 A.M. the *Markomannia* was boarded, and after her officers and crew had been removed she was sunk. Meanwhile officers from H.M.S. *Yarmouth* proceeded on board the *Pontoporos*, where they found a prize crew consisting of Sub-Lieutenant Mayer, Imperial German Navy, Sub-Engineer Freund, Imperial German Navy, together with nine German seamen and three German stokers, all belonging to the German cruiser *Emden*, as well as an officer belonging to the *Markomannia*. The aforementioned German officers and crew were thereupon made prisoners of war and sent on board H.M.S. *Yarmouth*. The *Pontoporos* was searched, and her master, who had for some time been a prisoner in his berth, but had afterwards been released by the German prize crew, was interviewed by Captain Cochrane, who was informed that the *Pontoporos* at the time of her capture was on a voyage from Calcutta to Bombay or Karachi laden with coal, that the vessel had been captured by the *Emden* on September 10 off the coast of Ceylon, that after the capture of the *Pontoporos* by the *Emden*, the prize crew had not only confined the captain to his cabin as aforesaid, but threatened the Greek crew with revolvers when work was required of them."

On the approach of the *Yarmouth* the German officers threw overboard ciphers, confidential documents, and their own and their crew's arms. The German prize crew were transferred to H.M.S. *Yarmouth*. The *Yarmouth* remained in the vicinity, anticipating the arrival of the *Emden*, until about 6 P.M. on October 12. She then put to sea with the *Pontoporos*. On October 14, as the orders of the *Yarmouth* necessitated her proceeding at a greater speed than the *Pontoporos* was capable of, the *Pontoporos* was transferred to the charge of the French cruiser *D'Iberville* for conveyance to Penang, the vessels being then in lat. 5.30 N. and long. 100 E. (approximately). The *Pontoporos* was subsequently brought safely into port and restored to her owners.

Upon these facts the defendants contended that the proper conclusions were :

(1.) That the *Emden* would have released the *Pontoporos* on or

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about October 13, and that she was therefore in no presumptive peril.

(2.) That if the vessel had been taken before a German Prize Court she would not have been condemned.

(3.) That if she was not taken to such a Court she would not have been sunk, or appropriated by the German cruiser.

The consequential contention was that she should be restored to the owners without payment of salvage.

On October 12 (the day before the master of the vessel was said to have expected a release) she had been a captured vessel in charge of a prize crew for over a month. She had thus lost in freight a very substantial sum. She had between 4000 and 5000 tons of coal still on board, consigned to British merchants.

If a promise to release was made, it was for some ulterior purpose of quieting the crew, or compelling them to work for the German cruiser and supply ship. The Court declines to believe that any such promise was honestly made, or was intended to be kept. There had already been threats to sink the ship; and if it had suited those in charge of the German cruiser, after taking away all the cargo, and after making any further use they wished and could of the vessel and her crew, the ship would have been sunk.

As to the rest, the German cruiser never intended to take or send the neutral ship to a German Prize Court for a judicial determination as to whether she ought to be condemned. If otherwise, by some remote fortuity, her case had ever come to be adjudicated upon before such a Court, enough has come to the knowledge of this Court from the cases cited in argument, and from other cases, to satisfy the Court that the chances of her owners of obtaining restitution would be as nothing. The "presumption which is to be entertained in favour of every state which has not sullied its character by gross violations of the law of nations" can no longer be expected to avail the state of the original captors.

If the vessel would not have been taken before any Prize Court in Germany, or belonging to the German Empire, what, then, would have happened? This is more than indicated by art. 113 of the German Prize Code. It has been noted that on the capture the cause given was that the neutral vessel was carrying contraband. However that may have been in fact or law, the officer of

the capturing cruiser would no doubt deal with her accordingly. Under art. 113 the commander of the cruiser would be entitled to destroy the neutral vessel if he considered it subject to condemnation for carrying contraband, and if bringing the vessel into port would subject the cruiser to danger or be liable to impede the success of its operations; and this would be assumed if the captured vessel could not follow the war vessel and was therefore liable to recapture; or if the proximity of the enemy forces gave ground for a fear of recapture; or if the war vessel was not in a position to furnish an adequate prize crew to take the vessel to a German port.

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If the commander of the cruiser was "entitled" under German law to take the course of destroying the captured vessel, I prefer to express the opinion that he would have taken that course, rather than speculate as to what would have been said to him by his state if he had not.

The opinion of the Court is that the recapture of the *Pontoporos* in these circumstances saved the ship for its owners from condemnation in any prize proceedings, or from the almost certain risk of destruction if she were dealt with upon the high seas without even the opportunity of placing her case before any judicial tribunal.

Upon the strictest legal grounds, as well as upon every ground of equitable dealing, I decide that restitution to the Greek owners on recapture should be upon payment of reasonable salvage. For such salvage I award one-sixth of the value, which is 7333*l*.

Solicitor for plaintiffs: *Arthur Tyler*.

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis*.

E. C. T.

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March 20.

DOBSON v. DOBSON AND PAXTON.

Divorce Practice—Motion to dispense with Co-respondent—Locus standi of Respondent.

On a motion to dispense with a co-respondent :—

Held by Bargrave Deane J., that the respondent had no locus standi, and, notwithstanding the fact that notice of motion had been served on her solicitors, that she could not be heard in opposition to the application.

THIS was a motion by the petitioner to strike out two paragraphs containing the only charges of adultery in the petition and to amend the petition by adding a charge of adultery in February and March, 1915, at some place unknown and with some man unknown, resulting in the birth of an illegitimate child on December 7, 1915.

The petition was dated September 15, 1915, and the first of the two paragraphs now sought to be struck out made a general charge of adultery with a named co-respondent, but without mentioning dates or places; while the second of the said paragraphs alleged adultery with the same co-respondent during the months of October, November, and December, 1914, and January and February, 1915, at a specified address.

The named co-respondent had not been served with the citation and copy petition.

A summons on behalf of the petitioner asking (inter alia) that the issue as to the respondent's adultery should be set down and tried as an undefended cause, notwithstanding that the co-respondent had not been served, came before Bargrave Deane J. on February 7, 1916, and was adjourned generally with liberty to apply. The respondent was served with and had opposed that summons.

W. O. Willis, for the petitioner, now applied, in terms of the notice of motion.

C. L. Beddington, for the respondent and co-respondent, opposed. This is a complete alteration of the charges made in the petition.

The respondent has been served with notice of the motion, and she is entitled to be heard in opposition thereto : *Jeffers v. Jeffers*. (1)

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BARGRAVE DEANE J. You have no locus standi. The case cited is not an authority in support of your contention that you have a right to be heard. I make an order in the terms of the notice of motion.

Beddington asked for the costs of the named co-respondent, stating that he was instructed on his behalf to make this application in the event of the Court striking out the charges made against him.

BARGRAVE DEANE J. No.

Solicitors for petitioner : *Joynson-Hicks, Hunt, Cardew & McDonald*.

Solicitors for respondent and co-respondent : *Corsellis & Berney*.

(1) (1877) 2 P. D. 90.

H. D. G.

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THE ANGLO-MEXICAN (PART CARGO EX).

March 6, 30.

Prize Court—Seizure of Goods of Enemy Firm—Goods shipped before Outbreak of War—Neutral Partner's Share—Conditions of Protection from Confiscation.

Where goods belonging to an enemy firm are seized as prize, the goods having been shipped to the firm before the outbreak of war, a neutral partner of the firm will not lose his right to have his share of the goods protected from confiscation merely because he allows the delivery of the goods to the firm to proceed in the ordinary course, provided he does no act after the commencement of hostilities to further or facilitate that delivery.

HEARING before Sir Samuel Evans, President, of a suit for condemnation of part of a cargo seized as prize.

On August 3, 1914, 276 bales of cotton sweepings were shipped by Reis & Co. on board the steamship *Anglo-Mexican*, a British ship, at Savannah for carriage as to fifty of the bales to Antwerp, and as to the residue to Hamburg to be delivered to the order of the shippers. The bills of lading specified that notification of the shipment was to be given to Reis & Co., Friedrichsfeld, Baden. On September 5, the ship put into the Port of London, where in consequence of the direction in the bills of lading that notification was to be given to a German firm the cotton was seized by the officers of Customs as prize.

The cotton was admitted to be the property of Reis & Co. That firm, which carried on business at Friedrichsfeld in Germany, at Manchester in England, and at Boston in the United States of America, consisted of four partners, two of whom, Edwin Reis and Ludwig Reis, were German subjects and resided at Heidelberg; the third, Karl Bachert Strauss, was a naturalized Englishman who managed the branch office of the firm at Manchester; and the fourth, Richard Mayer, a naturalized American, conducted the business of the firm at Boston. Strauss's share of the business was one fourth, Mayer's was one fifth, and the remainder belonged to the two German partners. Strauss, who was in Germany at the outbreak of war and continued to reside there, made no claim to his share of the goods seized. Mayer, who also was in Germany

when war broke out, but apparently did not remain there, claimed restitution of his share upon the ground that he was a neutral partner, and that the goods had been innocently shipped to the German house before the war began.

The evidence showed that Mayer had bought and paid for the cotton in America, and that it had been shipped by his directions, but he did nothing further in the matter and left the delivery according to the terms of the bills of lading to take its course.

Maurice Hill, K.C., and *Pilcher*, for the Procurator-General. The firm was an enemy firm, and the neutral partner is not entitled to ask for restitution of his share of the goods unless he can show that immediately upon war being declared he took steps to dissociate himself from the firm. The onus in that respect lies upon him: *The Mannigtry*. (1) But there is no evidence that he did so; his affidavit is silent on the subject.

Inskip, K.C., and *Conway*, for Mayer. The fact that the cotton was shipped before the war entitles Mayer to restitution of his share. He did nothing to assist the consignees to get delivery of the goods—he simply allowed matters to take their course; and not being a subject of the British Crown he owed no duty to it to give information as to the fact of the shipment or its destination.

Maurice Hill, K.C., in reply. Before a neutral partner in an enemy house can ask the Court to release his share he must show that he ceased to identify himself with the enemy at the earliest possible moment. He cannot take the benefit of remaining a member of the firm and claim to have his property protected. If he continues his connection during the war his right to protection is gone: *The Vigilantia* (2), per Sir W. Scott. And this principle equally applies whether the goods which have been captured were shipped before the war or after.

Cur. adv. vult.

March 30. THE PRESIDENT (SIR SAMUEL EVANS), read the following judgment:—The claim to this part cargo, 276 bales of factory or cotton sweepings, was made originally by Messrs.

(1) (1915) 1 Br. & Col. P. C. 497.

(2) (1798) 1 C. Rob. 1, 15.

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Reis & Co., of Manchester, as alleged owners, and alternatively by Reis & Co., of Boston, United States, as alleged owners.

The facts have now been investigated. The following are the results:—The property in question belonged to Reis & Co., of Friedrichsfeld, Heidelberg, Germany. That firm consisted of four partners—two German subjects, a naturalized Englishman of the name of Karl Bachert Strauss, and a naturalized American of the name of Richard Mayer. Strauss's share was one fourth and Mayer's one fifth. The rest belonged to the Germans. Strauss was in Germany at the outbreak of the war, and apparently has remained there, adhering to the enemy ever since. The branch office which he managed at Manchester was raided, and one of his clerks was convicted of trading with the enemy. It is not surprising that no claim is now made on his behalf.

The shares of the German partners and Strauss's own share, i.e., four fifths of the whole, must be condemned as the property of enemies of this country and of a naturalized Englishman who has put himself into the same category.

There remains the claim of Richard Mayer to one fifth share in the goods. He had become a naturalized American before the war, and puts forward his claim as a neutral partner in the German house. No doctrine in prize law is more clearly and firmly settled than that the property of such a house of trade or business as that of the firm of Reis & Co. in Heidelberg, established in the enemy's country, is subject to capture or seizure and to condemnation as prize during war, whatever may be the domicile of the partners. But with regard to ante bellum transactions and shipments this doctrine is subject to some qualifications in the case of subjects of the other belligerent and of neutrals in reference to trades or businesses in which they might be engaged at the beginning of a war.

An early and authoritative statement upon the subject was made by Sir William Scott in *The Vigilantia*. (1) In dealing with three cases which had been decided by the Lords Commissioners of Appeal in Prize cases between 1785 and 1798, namely, *The Jacobus Johannes* (2), *The Osprey* (3), and *The Nancy*

(1) 1 C. Rob. 1, 15.

(2) Not reported.

(3) Not reported.

(*Coopman's Claim*) (1), Sir William Scott said: "It was then" (i.e., in the last case) "said by the Lords, that the former cases were cases merely at the commencement of a war; that in the case of a person carrying on trade habitually in the country of the enemy, though not resident there, he should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation; but it was then expressly laid down, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connexion during the war, he should not protect himself by mere residence in a neutral country."

These have been the doctrines adopted by America and by this country ever since: see *The Antonia Johanna* (2); *The Freundschaft* [*sic*] (3); *The San Jose Indiano* (4); *The Cheshire*. (5)

I have dealt recently with the case of British subjects who were partners in enemy firms, and their position and duties at the outbreak of war in *The Manningtry*. (6) Incidentally the position of neutral subjects similarly situated was also there considered. What was then said it is not necessary to repeat.

It is obvious that in one respect there is a difference between the duties of a British subject and a neutral in such cases. There is an absolute duty strictly incumbent upon a British subject not to do anything which may amount to trading with the enemy, or to have any business intercourse with him. There is no such duty upon a neutral partner. He acts fully within his rights in remaining in the partnership after hostilities if he cares to subject his share in the goods to the risk of capture and confiscation by the opposite belligerent during war.

The question turns upon the stage at which in the case of a pre-war shipment a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation. It is a question of fact upon which side of the line a particular case falls. One test would be whether the neutral partner has done anything actively after the commencement of

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(1) Not reported.

(2) (1816) 14 U. S. 159.

(3) (1819) 17 U. S. 105.

(4) (1814) 2 Gall. 268.

(5) (1865) 70 U. S. 231.

(6) 1 Br. & Col. P. C. 497.

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hostilities to further or facilitate the delivery of the goods to the enemy house. This test does not seem to me to be unfavourable to the neutral or unfair to the belligerent. If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary course, I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State.

At the outbreak of war Mr. Mayer happened to be in Germany. He did not inform the Court as to this, or as to his business there, or as to the date of his return to America. His affidavit on these matters is disingenuous. His counsel did not attempt to justify it. I do not wish to say that the deponent had an intention to mislead. I know not how he may have been advised in framing the affidavit. I have had some doubt as to whether, because of the non-disclosure of what may have been material facts, he ought not to forfeit his protection; but I give him the benefit of the doubt.

I order restitution of his one fifth share in the goods or their proceeds, and condemnation of the remaining four fifths as prize to the Crown in its rights to droits of admiralty.

Order for restitution of Mayer's share.

Solicitor for the Procurator-General: *Solicitor to the Treasury.*
Solicitors for Mayer: *Oppenheimer, Blandford & Co.*

J. F. C.

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1916

Jan. 25 ;
March 28.

Admiralty—Ship—Forfeiture—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 76—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 51.

The Commissioners of Customs and Excise, being in doubt as to the title of a steamship, formerly called the *Walter Dammeyer*, but then known as the *Polzeath*, to be registered as a British ship, and acting under s. 51 of the Merchant Shipping Act, 1906, directed the plaintiff, as registrar of shipping at the port of King's Lynn, in the county of Norfolk, where the ship was registered in the name of the Lynn and Hamburg Steamship Company, Limited, to require evidence to be given to his satisfaction, within a fixed time, that the said ship was entitled to be registered as a British ship. The answer of the manager of the company not being deemed satisfactory, the plaintiff, acting under s. 76 of the Merchant Shipping Act, 1894, commenced an action against the owners of the steamship for a declaration of forfeiture :—

Held by Bargrave Deane J., in giving judgment for the plaintiff with costs, and declaring the *Polzeath* to be forfeited to His Majesty, that the evidence, particularly the correspondence and minute book of the company, showed that, though the company was composed of fourteen shareholders of whom four were directors (of whom two were Germans), the affairs of this so-called English company, and especially the management of the only steamship belonging to this steamship company, were entirely directed from Hamburg by one Hermann Dammeyer, a naturalized British subject, holding 845 out of a total of 1610 shares in the company, and acting as chairman of the board of directors, but residing at Hamburg both before and after the outbreak of war between this country and Germany.

FORFEITURE OF SHIP.

The plaintiff, proceeding for a declaration of forfeiture, was Walter Charles Searley, an officer of Customs and Excise, and, at the material time, acting registrar of shipping at King's Lynn in the county of Norfolk.

The defendants were the owners of the steamship *Polzeath*, which vessel, formerly known as the *Walter Dammeyer*, was registered as a British ship at the port of King's Lynn in the name of the Lynn and Hamburg Steamship Company, Limited ; but the Commissioners of Customs and Excise, being in doubt as to the title of the said ship to

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be so registered as a British ship, and acting under s. 51 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), on or about October 30, 1914, directed the plaintiff to require the company to give evidence to his satisfaction, within thirty days of the above date, that the said ship was entitled to be registered as a British ship. On November 2 the plaintiff, as registrar, accordingly wrote to A. L. Tassell, manager of the company ; but no satisfactory evidence being, in the opinion of the registrar, forthcoming (the substance of the evidence produced appears from the judgment), he issued on September 23, 1915, a writ, and by his statement of claim, delivered October 8, claimed that " it be declared and adjudged . . . that the said ship with her tackle apparel and furniture became and was forfeited to His Majesty, and that the said ship be forfeited to His Majesty, and that the said ship may be sold by the marshal of the Court or that such order may be made as to the Court seems just, and that the Court may award to the plaintiff such portion of the proceeds of the sale of the said ship, if it be sold, as the Court may think fit." In the meantime, on or about May 1, 1915, the ship was requisitioned by and chartered to the Lords Commissioners of the Admiralty, in whose possession she was, and her name was changed to the *Polzeath*, the Lords Commissioners agreeing to hold the ship subject to the adjudication of the Court.

By their defence, delivered November 1, the defendants alleged that the steamship was and is owned by the Lynn and Hamburg Steamship Company, Limited, which company was duly formed under the Companies Acts in 1888, and has its registered office and principal place of business in England, and the steamship was duly registered under the Merchant Shipping Acts in 1911, and the port of registry was and is King's Lynn. The defendants relied upon the declaration and exhibits thereto of A. L. Tassell, the manager of the defendant company, made in pursuance of the request contained in the letter of the plaintiff, and the defendants submitted that the plaintiff was not entitled to the declaration or judgment claimed, and that the Court had no jurisdiction in the matter.

1916. Jan. 25. *Sir F. E. Smith, A.-G., Leslie Scott, K.C., and James Wylie*, for the plaintiff. It is submitted that the plaintiff fulfils the conditions required by s. 76 of the Merchant Shipping Act,

1894, as to the proper officer to act at the request of the Commissioners of Customs and Excise in a matter of this kind, and that, on the evidence obtained by him, he is entitled to the declaration asked for on the ground that, in respect of the ownership of the vessel in question, the defendants have failed to discharge the onus laid upon them by statute to satisfy the inquiries made by the plaintiff as registrar for, in particular, the body corporate claiming the ownership of this ship does not fulfil the conditions required by s. 1 of the Merchant Shipping Act, 1894, as such a body must be established under and subject to the laws of some part of His Majesty's dominions, and have its principal place of business in those dominions; whereas here the evidence shows that the management of the ship and its control are not exercised in this country—that is to say, the principal place of business of the company is not, in fact, in this country, for Hermann Dammeyer, who, on the evidence, is the directing spirit, though a naturalized British subject, resides in Hamburg, where he is not interfered with by the German authorities, being looked upon as a German subject, so that he has not been interned like the secretary of the company, and the correspondence between Dammeyer, as chairman of the board of directors, and Tassell, as manager of the ship, and the company's minute book, set out as exhibits to the statutory declaration of Tassell, show clearly that the company is completely under the orders of Dammeyer in Hamburg, so that the ruling in *De Beers Consolidated Mines, Ltd. v. Howe* (1) applies, namely, that the real business is carried on, as a matter of fact, "where the central management and control actually abides," the test of residence being, not where the company is registered, "but where it really keeps house and does its real business": see also *San Paulo (Brazilian) Ry. Co. v. Carter* (2); *American Thread Co. v. Joyce* (3); *Palmer v. Caledonian Ry. Co.* (4); Dicey's Conflict of Laws, 2nd ed., r. 19, p. 160; Temperley and Stuart Moore's Merchant Shipping Acts, 2nd ed., pp. 34, 500; Lindley's Law of Companies, 6th ed., vol. 2, p. 1223.

F. D. MacKinnon, K.C., and *C. R. Dunlop*, for the defendants. The owners of this ship constituted a "body corporate" fulfilling the condition imposed by s. 1 (d) of the Merchant Shipping Act, 1894,

(1) [1906] A. C. 455.

(2) [1896] A. C. 31.

(3) (1913) 29 Times L. R. 266.

(4) [1892] 1 Q. B. 823.

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of being “established under and subject to the laws of some part of His Majesty’s dominions, and having their principal place of business in those dominions.” There can be no reason why the ordinary rule applicable to cases of this description should not apply and the registered office of this company be treated as its principal place of business. The whole case of the plaintiff rests on a few isolated expressions in the later letters of Hermann Dammeyer, and if in some instances those expressions assumed a dictatorial tone they had no binding force on the company, for it must be remembered that he was not managing director, but only chairman of the board of directors, and, in fact, the so-called orders contained in those letters, particularly as to the employment of the vessel, were disregarded by those directly responsible for the working of the company and the management of the ship. (1)

Cur. adv. vult.

March 28. BARGRAVE DEANE J. Before and on October 30, 1914, a vessel named the *Walter Dammeyer* was registered as a British ship at the port of King’s Lynn, Norfolk, in the name of the Lynn and Hamburg Steamship Company, Limited.

The Lynn and Hamburg Steamship Company, Limited, was duly formed under the Companies Acts in 1888, and has its registered office and principal place of business in England. So far as appears in the evidence, the *Walter Dammeyer* is the only steamship owned by this company. She was registered as a British ship in 1911, and her port of registry was and is King’s Lynn in Norfolk.

According to the declaration dated November 19, 1914, of Arthur Lyon Tassell, the manager of the said company, the shares in the said company are held by fourteen persons in all, four of whom are directors, namely, Hermann Dammeyer, of Hamburg ; G. A. Meves, of London ; Henry Ruffer, of London ; and Carl Breithan, of Hamburg.

The fourteen shareholders are :—

	Shares.
(1) Hermann Dammeyer, Hamburg	845
(2) Gertrude Dammeyer, his wife	6
(3) Carl Breithan, Hamburg	50
(1) <i>W. N. Raeburn</i> (instructed by Burgess, Cosens & Co.) held a watching brief for British shareholders in the company	

(4) Henry Ruffer, London	160	1916
(5) Walter Savage, Hamburg	2	
(6) G. A. Meves, London	100	THE
(7) Hallack & Bond, Cambridge	10	POLZEATH.
(8) Helene Schrader, Brunswick	10	Bargrave Deane
(9) Frederick Cleves, London	10	J.
(10) Charles Ford, St. Leonards-on-Sea	16	
(11) Alfred Bone, Streatham Hill	1	
(12) George Charles Vasmer, London	210	
(13) Charles John Bailey, London	150	
(14) Thomas G. Bilton, Wallington, Surrey.. ..	40	
	1610	

The four directors, according to Mr. Tassell, are :—

Dammeyer, a naturalized British subject living in London till six or seven years ago, when he went with Walter Savage, the secretary of the company, to Hamburg, where he has lived ever since. When war broke out the secretary was interned by the German authorities, but Dammeyer has remained at liberty in Hamburg.

Meves, a British subject, born and living in London.

Ruffer, a naturalized British subject, 1891, of Swiss origin, but born in France.

Breithan, a German subject living in Hamburg.

I have no doubt, from the history of Dammeyer, and the fact that he is now living freely in Hamburg, though the secretary, who lived with him there, has been interned, that though naturalized here he is recognized as a German subject by the German authorities.

It was proved to my satisfaction that Dammeyer has been to all intents and purposes an autocrat in managing the affairs of this so-called English company from Hamburg before and since the war, and especially in the management of the only steamship belonging to this steamship company.

The correspondence and minute-book of the company show this, but I do not propose to go through them in detail in my judgment. They were put in evidence before me.

I am satisfied that this company, though nominally composed of these fourteen shareholders, of whom four were directors (of whom two were Germans), was entirely managed and directed from

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Hamburg by Hermann Dammeyer. The declaration of Mr. Tassell shows that when the London directors wished to let the ship on charter, Mr. Dammeyer, by his agent in Holland, peremptorily forbade it, with the result that the London directors at once submitted and abandoned the idea.

The name of the ship was subsequently changed from that of *Walter Dammeyer* to *Polzeath*, and she is now in the hands of the Admiralty.

On or about October 30, 1914, after war had been declared between this country and Germany, the plaintiff, Walter Charles Searley, acting registrar of shipping at King's Lynn, pursuant to s. 51, 6 Edw. 7, c. 48, required from Mr. Tassell, the manager at King's Lynn, evidence to be given to his satisfaction that the ship was entitled to be registered as a British ship, and Mr. Tassell made the declaration and furnished the other information to which I have before referred.

Not being satisfied, Mr. Searley commenced this action under the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 69, 71 and 76, to have the ship declared forfeit to His Majesty.

The question I have to ask myself is whether the *Polzeath* is entitled to her registry as a British ship, or whether she is in fact a German ship assuming a British character and using the British flag wrongfully, being, in fact, subject to the orders and direction of a company German in feeling and controlled by a German resident in Germany.

My attention has been called to several decisions as to what is to be looked to in order to ascertain the true character of this so-called English company and English ship. These cases are:—*Palmer v. Caledonian Ry. Co.* (1); *San Paulo (Brazilian) Ry. Co. v. Carter* (2); *De Beers Consolidated Mines, Ltd. v. Howe*. (3)

The cases come to this, that to decide the true character and entity of a business or company you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living motive power.

The whole of the documents in this case point to Mr. Hermann Dammeyer as the life and driving force of this so-called English company, and director of the use to which this single ship of the com-

(1) [1892] 1 Q. B. 823.

(2) [1896] A. C. 31.

(3) [1906] A. C. 455.

pany is to be put, and the English shareholders and directors as mere puppets pulled by his strings. In my opinion, the whole history of this gentleman, although he has been naturalized in this country, leads me to the belief that he still considers himself a German, and by residing at Hamburg during this war without molestation by the German authorities he is recognized by them as a German subject, and as such must be considered in this Court, and the company and ship which he so controls are not entitled to registration as an English company or as an English ship.

I therefore declare the *Polzeath* to be forfeited to His Majesty.

There will be judgment for the plaintiff with costs.

*Liberty to apply in respect of English-owned shares.
Ship not to be sold, and execution to be stayed, for
a fortnight if defendants appeal within that time.*

Solicitor for plaintiff : *Solicitor for the Customs and Excise.*

Solicitors for defendants : *Holman, Birdwood & Co.*

T. L. M.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE STIGSTAD.

[1915 No. 9.]

1915

Aug. 25.

1916

April 14.

*Prize Court—"Retaliatory" Order in Council of March 11, 1915—
Validity—Inconvenience to Neutrals—Compensation for Delay and
Expenses—Freight.*

The Order in Council of March 11, 1915, "for restricting further the commerce of Germany" (generally known as the "Retaliatory" Order) is not invalid by reason of the fact that, in providing that merchant ships may be required to discharge in a British or allied port goods on board destined for the enemy or of enemy origin, inconvenience is necessarily caused to neutral shipowners.

The Order does not entail upon neutrals a degree of inconvenience which is unreasonable considering all the circumstances of the case, and neutral shipowners are not entitled to compensation

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unless, possibly, unreasonable delay or expense has been incurred in carrying out the provisions of the Order.

Freight, in accordance with the principles laid down in *The Juno* (1914) 1 Br. & Col. P. C. 151, allowed to the shipowners out of the proceeds of the sale of the discharged goods.

SHIPOWNERS' claims for freight, detention, and expenses.

On April 10, 1915, the Norwegian steamship *Stigstad*, in pursuance of a charterparty entered into on January 20, 1915, loaded at Kirkenes in Norway a cargo of iron ore briquettes for carriage to Rotterdam to be there transhipped into Rhine barges for purchasers in Germany. On April 18 the *Stigstad* was stopped off the Orkneys by H.M.S. *Inconstant* and sent to Leith, where she docked on April 21; on April 27 she was taken to Middlesbrough for the discharge of her cargo, which began on May 1 and was completed on May 15. These proceedings were taken under an Order in Council of March 11, 1915, "framing reprisals for restricting further the commerce of Germany" (generally known as the "Retaliatory" Order). Under this Order no merchant vessels are allowed to proceed to or from a German port, and it is, inter alia, provided that vessels may be required to discharge in a British or allied port goods on board which are of enemy origin or which have an enemy destination. The articles material to the present case are set out in the judgment.

The owners of the *Stigstad* claimed (1.) freight 3953*l.* 2*s.* 1*d.*; (2.) damages for twenty-two days' detention at 130*l.* per diem, 2860*l.*; (3.) expenses at Leith, 65*l.* 3*s.* 6*d.*

On August 26, 1915, when the claims of the Norwegian cargo owners came before the Court, the learned President made an order for the proceeds of the cargo, which had been sold by consent of the marshal, to be released to the claimants' representative in England, less a sum to be agreed upon for freight, or, in the absence of agreement, to be determined by the registrar in accordance with the principles laid down in *The Juno*. (1)

With regard to the claims in respect of detention and expenses his Lordship said: "With reference to the claim made against the Crown in respect of the detention of the vessel—not the improper, but the necessary detention of the vessel—in order to carry out the

(1) 1 Br. & Col. P. C. 151.

Order in Council, I have suggested that, in order to minimize as far as possible the loss to neutrals, it might be well for the Crown to arrange to hand over some sum to the owners of the ship.

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“ I am not deciding whether the owners of the ship are entitled as a matter of right to any such sum, although I may have to decide that some day. This case will be adjourned, so far as the claim against the Crown is concerned, in order to see what may be done. I am willing to undertake to decide, in the absence of agreement between the Crown and the shipowners, what sum, if any, is to be paid ; but it must be understood, in that event, that it will be a sort of arbitration from which there can be no appeal.”

1916. April 14. *MacKinnon, K.C.*, and *H. Hull*, for the Procurator-General. Having taken the opinion of the Admiralty, the Foreign Office, and the Treasury, the Procurator-General cannot agree to a payment *ex gratia* in respect of the detention and expenses, and the question must be left to the judicial decision of the Court. If there were any undue delay the shipowners might have a claim, but in the present case there was no more delay than was inevitable. The *Stigstad* went from Leith to Middlesbrough to discharge the cargo at the request of her owners. There is no power to award compensation for detention or expenses reasonably incurred in the exercise of the powers conferred by the Order in Council.

Dawson Miller, K.C., and *R. A. Wright*, for the claimants. Although there was no unnecessary delay or expense, the *Stigstad* in fact was delayed twenty-two days beyond the time it would have taken her if she had gone to her port of destination to discharge. The Order in Council ought not to be administered so as to interfere with the rights of neutrals as laid down by the Declaration of Paris, 1856, unless the Crown allows compensation. On carrying out reprisal Orders it has never been laid down that the rights of neutrals could be affected to the extent of making a neutral contribute to the expense of enforcing the Order. If the effect of the Order is that injury and inconvenience are to be caused to neutral shipowners without compensation, the Order is contrary to international law and invalid.

MacKinnon, K.C., in reply. The claimants deliberately attempted to carry the cargo in the face of the Order in Council. From the

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fact that under the bills of lading the goods were deliverable to a barge company at Rotterdam the claimants should have inferred that the goods were going up the Rhine, and inquiry would have shown that they were going to a German firm at Lubeck. Where there has merely been the necessary delay and inconvenience occasioned by the enforcement of the Order, the neutral has no claim upon the Crown, otherwise there would be no deterrent to persons acting in defiance of the Order. Having regard to the judgment of the Privy Council in *The Zamora* (1), it is clear that because an Order in Council authorizing reprisals inflicts some inconvenience on neutrals it is not thereby invalid. It is not possible to present a full argument to the Court on the question of the validity of the Order, as, owing to a mistake as to the attitude taken up by the Crown, neither party came into Court prepared to argue the point.

SIR SAMUEL EVANS, PRESIDENT. A very important question has been raised in this case by counsel for the claimants as to the validity of the Order in Council of March 11, 1915, generally called the "Retaliatory" Order. The argument upon it has not been very full. It would have been a pleasure to me, and I have no doubt an assistance also, to have heard a fuller argument by counsel on both sides. But inasmuch as doubt has been thrown upon the validity of the Order, I think it right to express my opinion upon it now, so as to put an end to the doubt so far as this Court is concerned.

If the parties should want to appeal it would be right that I should put my reasons more fully into writing; but, having regard to the nature of the point that has been raised, I will at once proceed to pronounce my opinion upon it.

The *Stigstad* is a Norwegian ship, which sailed from a port in Norway on April 10, 1915, with, inter alia, the cargo in question, consisting of metallic ore in briquettes to Rotterdam for transshipment into Rhine barges. It is obvious that the shipowners would have had no difficulty in finding out, if indeed they did not know the fact, that the goods were for a German destination. It is admitted that the goods were of a description to which art. 3 of the Order in Council applies:

"Every merchant vessel which sailed from her port of departure

(1) [1916] 2 A. C. 77.

after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto."

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Art. 5 of the same Order in Council provides that :

"(1.) Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war) placed in the custody of the marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

"(2.) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order."

I have read art. 5 of the Order in Council in order to point out that it deals only with claims in respect of goods which are required to be discharged under the provisions of the other articles of the Order in question. This claim does not come within, and is not made under, art. 5.

The question here is whether, as a matter of law, the owners of this vessel are entitled to damages for detention consequent upon her being required to enter a British port and to remain there until her cargo was discharged. I need not go through the dates, because it has been expressly admitted by counsel for the claimants that no further delay or inconvenience was caused to the owners of the ship than was inevitable or necessary to carry out properly the provisions of the Order.

In my opinion, I have no right, as a matter of law, to order compensation to neutrals for any loss which they may sustain if the provisions of the Order are carried out in a reasonable way. If there should be any unreasonable delay or any unnecessary expenses

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caused, I think the probability is—I need not decide the question at present—that I should have the right, in accordance with the principle applied in days past against captors, to say that for such delay or expense compensation should be made.

The Order in Council is issued, as the preamble states, as a retaliatory or reprisal Order; and, according to the decision given recently by the Privy Council in *The Zamora* (1), any Order in Council authorizing reprisals is conclusive as to the facts which are recited as showing that cause for reprisals exists. I need not read the preamble. (2) It is enough for me to say the preamble states that cause has arisen for reprisals by reason of the facts recited therein.

It has been argued by counsel for the claimants that the Order in Council is unlawful because it entails upon neutrals a further degree of inconvenience. Any interference with the trade of an enemy, in so far as that trade is carried by the ships of neutrals, must necessarily cause inconvenience. In the case of contraband, and particularly in the case of a breach of blockade, the inconvenience to neutrals is very great. It has been publicly stated—I may as well repeat it here—that the Order in Council deals very leniently with neutrals engaged in trade with the enemy which this country thinks it is right to try to put a stop to. In the case of a breach of blockade

(1) [1916] 2 A. C. 77.

(2) The preamble is as follows:

“Whereas the German Government has issued certain orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare;

“And whereas in a memorandum accompanying the said orders neutrals are warned against entrusting crews, passengers, or goods to British or allied ships;

“And whereas such attempts on

the part of the enemy give to His Majesty an unquestionable right of retaliation;

“And whereas His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or non-combatant life, and in strict observance of the dictates of humanity;

“And whereas the allies of His Majesty are associated with him in the steps now to be announced for restricting further the commerce of Germany:

“His Majesty is therefore pleased, by and with the advice of his Privy Council, to order” &c.

or of an attempt to break blockade the neutral would suffer a complete confiscation of the vessel. Nothing of the kind results under the terms of the present Order in Council. All that is done is to take the vessel and her cargo to a British port. The vessel is released, or ought to be released, as soon as what is necessary to comply with the Order as to the discharge of the cargo has been done; and her owners also receive a proper sum in respect of freight.

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According to the judgment of the Privy Council in *The Zamora* (1), although the recitals as to the case for reprisals are conclusive, the Court is not actually bound to hold that the means of meeting an emergency by way of reprisals are the best or only means. The Privy Council further said that no party aggrieved is precluded from contending "that these means are unlawful as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case."

If I have to express an opinion on that, I express it without doubt, that the means adopted in this Order in Council do not entail upon neutrals a degree of inconvenience unreasonable considering all the circumstances of the case, and that therefore it cannot be said that by reason of these means the Order is in itself unlawful.

In the result, I am of opinion that the Order in Council is lawful as an Order enjoining reprisals in accordance with the principles of international law. The result, in my opinion, is that whatever delay or inconvenience is inevitably or necessarily caused, as in this case, must be suffered by neutrals, as the consequence of the exercise of legitimate belligerent rights on the part of this country.

I repeat that I should have been glad to have had fuller arguments, and to have had time to refer to authorities and put my reasons into better form. But, the matter being so important, I think it right to pronounce my opinion now that there is nothing invalid in this Order in Council, and that it is an Order to which this Court ought to and will give effect.

My order is that this claim of the shipowners is disallowed.

Solicitor for the Procurator-General: *The Treasury Solicitor*.

Solicitors for claimants: *Botterell & Roche*.

(1) [1916] 2 A. C. 77.

E. C. T.

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May 3.

WILLIAMS v. WILLIAMS.

Divorce Practice—Husband's Petition—Leave to proceed without citing any Co-respondent—Affidavit by Person since deceased—Leave to read Affidavit at the Hearing.

Upon an undefended divorce petition by the husband, making general charges against the wife of acting as a common prostitute and also containing specific charges of acts of adultery with men unknown, upon proof at the hearing of the death of one of the deponents whose affidavit was before the Court on the motion dispensing with co-respondents,

The Court (Shearman J.) allowed the affidavit of the deceased deponent to be read.

THIS was the husband's petition for dissolution of marriage on the ground of his wife's adultery with unknown men.

On February 21, in the course of the proceedings, an order was made giving the petitioner leave to proceed without citing any person as co-respondent. One of the affidavits before the Court upon that motion was sworn by a woman who had since died. Apart from general evidence of consorting with men for immoral purposes, this deponent swore to specific acts of adultery committed by the respondent.

At the hearing before Shearman J., evidence by the petitioner and police witnesses having been given to the effect that the respondent had been in the habit of consorting with prostitutes and with different men, and, by the petitioner's solicitor, proving the death of the particular deponent,

Acton Pile, for the petitioner, asked leave to read the affidavit of the particular deponent before referred to.

SHEARMAN J. I think the best course is that I should make an order now that the evidence on the other part of the case, dealing with specific acts of adultery, may be given by affidavit. It seems only reasonable that this should be done where the deponent is

dead. It would be ordered in a proper case, if application were made before the hearing.

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The affidavit having been read,

SHEARMAN J. pronounced a decree nisi.

Solicitors : *Metcalfe & Sharpe, for W. M. Thomas, Bridgend.*

H. D. G.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

1916

(IN PRIZE.)

May 5.

THE ALWINA.

[1915 No. 503.]

Prize Court—Neutral Vessel—Contraband Cargo—Intention to supply Coal to Enemy Warships—False Papers—Circumstances of Fraud—Abandonment of Voyage—Disposal of Cargo—Capture on Return Voyage—Restitution—Costs.

The general rule of prize law is that when contraband goods have been discharged the liability of the carrying vessel to seizure is at an end. But a neutral vessel which, by means of false papers or other deceitful practices to elude capture, has carried a contraband cargo to the enemy, remains subject to confiscation on the return voyage. If, however, the intention and voyage have been clearly abandoned before the delivery of the cargo to the enemy the vessel is exempt on the return voyage.

A Dutch vessel left a British port with a cargo of coal ostensibly consigned to a firm at Buenos Aires, but in fact intended for German warships. On arrival at Teneriffe the master found that he was suspected, and abandoned the voyage and sold the cargo. In the course of her return voyage to her home port with a cargo of ore shipped at an intermediate Spanish port the vessel put into Falmouth, where she was seized as prize :—

Held, that she must be restored to her owner, but that, as he was an active party in an attempt to convey contraband to the enemy by means of false and fraudulent devices, he must pay the costs of the capture and detention and of the prize proceedings.

SUIT for condemnation of a neutral vessel on the ground that at the time of her capture she was on her return passage from taking a

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direct part in hostilities and from attempting to supply coal to enemy warships.

The *Alwina*, a steamship of 1115 tons, belonged to a Dutch company, the managing directors of which were the firm of Jos de Poorter, of which one Jos de Poorter was the sole partner. The vessel cleared from Newport (Mon.) on October 27, 1914, with a cargo of Welsh steam coal purchased by de Poorter and ostensibly consigned to a firm at Buenos Aires, to whom the vessel purported to be under charter. She had on board a person described as "steward," and subsequently as "passenger," who was in fact a supercargo of either German or Dutch nationality. He left the *Alwina* after her arrival at Teneriffe, where she put in for bunker coals. The master was unable to get coal. He was suspected of having coals on board for German cruisers, and according to his own statement he and the crew had themselves come to the conclusion that this was the probable object of the voyage. About November 25 de Poorter cabled that the charter had been cancelled and that he (the master) should sell the cargo. On December 19 he succeeded in selling the coal to a British firm less a certain quantity left for bunkering purposes. On December 30 the *Alwina* left for Madeira for orders. She was boarded by British naval officers on January 2, 1915, and ordered to go to Gibraltar for further examination. At Gibraltar she was again examined and permission was given to her to proceed to sea. She accordingly went to Huelva, where she loaded a cargo of sulphur ore consigned to Rotterdam. In the course of this voyage she put into Falmouth for repairs, and on January 23 was seized as prize.

1916. April 10, 12, 13. *Bateson, K.C.*, and *H. L. Murphy*, for the Procurator-General. Although wearing the mask of neutrality, the *Alwina* in fact was an enemy ship. Her owner was acting as an enemy, and she comes within art. 46, sub-ss. 1 and 2, of the Declaration of London, and possibly within sub-s. 3 also (1): see *The*

(1) Art. 46: "A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel—(1.) if she takes a direct part in the hostilities;

(2.) if she is under the orders or control of an agent placed on board by the enemy Government; (3.) if she is in the exclusive employ of the enemy Government."

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Carolina (1) ; Story's Notes on the Principles and Practice of Prize Courts (Pratt's ed.), p. 62 ; and Halleck's International Law, 4th ed., vol. 2, pp. 320—321. Although the property is neutral the commerce is not, "and where that is the case the mere neutral ownership will not be a sufficient title to restitution" : *The Rendsborg*. (2) The offence was complete from the time the *Alwina* left Newport with a hostile intention : Hall's International Law, 6th ed., p. 667 ; and the taint of the fraud travels with the ship during the whole course of the voyage : *Carrington v. Merchants' Insurance Co.* (3) It is not necessary for the cargo still to be on board : *The Fortuna*. (4) When the *Alwina* was captured she was trying to return to her home port, and it was in effect one transaction and voyage : *The Nancy*. (5) But in the case of unneutral service the vessel is not free from capture on the return voyage ; she can only claim immunity if the outward voyage was undertaken in good faith. In *The Margaret* (6) the vessel had been trading for three years before she was captured : see also *The Baltic*. (7) The principle is that a belligerent can capture and condemn any vessel guilty of perfidious or fraudulent practices whenever her guilt is established ; and carrying contraband outwards with false papers will affect the return voyage : *The Rosalia* (8) and *The Elizabeth* (8) ; see also *The Christiansberg*. (9) [*The Fanny* (10), *The Eenrom* (11), *The Atalanta* (12), and *Andersen v. Marten* (13) were also referred to.]

Maurice Hill, K.C., and *W. R. Bisschop*, for the claimant. Even if the coals were intended for the German fleet, the *Alwina* was merely guilty of carrying contraband ; the offence, if any, did not amount to unneutral service and was at an end. The vessel must be taken while still in delicto, and in any event cannot be captured and condemned on the return voyage for an attempt to commit an offence

(1) (1802) 4 C. Rob. 256 ; 1 Eng. P. C. 385.

(2) (1802) 4 C. Rob. 121, 124.

(3) (1834) 8 Peters, 495.

(4) (1811) 1 Dods. 81 ; 1 Eng. P. C. 193, n.

(5) (1800) 3 C. Rob. 122.

(6) (1810) 1 Acton, 333.

(7) (1809) 1 Acton, 25.

(8) (1802) 4 C. Rob., note to table of cases.

(9) (1807) 6 C. Rob. 376 ; 1 Eng. P. C. 580.

(10) (1814) 1 Dods. 443 ; 2 Eng. P. C. 202.

(11) (1799) 2 C. Rob. 1 ; 1 Eng. P. C. 168.

(12) (1808) 6 C. Rob. 440 ; 1 Eng. P. C. 607.

(13) [1908] A. C. 334.

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which was not in fact committed: *The Trende Sostre* (1); *The Lisette*. (2) The general rule is that a vessel is free from condemnation on the return voyage: *The Imina*. (3) Breach of blockade stands on a different footing, and a vessel which has broken blockade remains liable to capture until the termination of her voyage: *The Welvaart van Pillaw* (4); *The Frederick Molke* (5); *The Christiansberg* (6); but that is because there is no opportunity of enforcing the law until the return voyage, and in such cases an intermediate voyage, even in ballast, would be sufficient to break the continuity: *The Randers Bye*. (7) *The Margaret* (8) is insufficiently reported, and neither that case nor *The Baltic* (9) is in conformity with modern international law: see *The Allanton*. (10) The practice of capturing on the return voyage finds no recognition in the Declaration of London: see art. 38; and is almost universally disapproved of by international jurists: see Wheaton (Dana's ed.), ss. 506 and 524; Westlake, part 2, p. 292; Hall, 6th ed., p. 673; Oppenheim, vol. 2, pp. 507, 527; Lawrence, pp. 615, 625; Pitt Cobbett, 3rd ed., part 2, p. 429; Halleck, 4th ed., vol. 2, p. 247; Bluntschli, Droit International Codifié, s. 818, p. 461; Calvo, 4^{me} éd., vol. 5, ss. 2756—8; Ortolan, Diplomatie de la Mer, liv. 3, ch. 6. [*The Friendship* (11), *The Orozembo* (12), *The Thor* (13), and *The Zambesi* (14) were also referred to.]

Bateson, K.C., in reply.

Cur. adv. vult.

May 5. SIR SAMUEL EVANS, PRESIDENT. The steamship *Alwina* is a neutral vessel of Rotterdam and the property of a Dutch company. She was seized at Falmouth.

The claim of the Crown, as it appears by the writ, is that the ship

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| (1) (1807) 6 C. Rob. 390, n.; 1 Eng. P. C. 588. | (7) (1807) 6 C. Rob. 382, n. |
| (2) (1807) 6 C. Rob. 387; 1 Eng. P. C. 587. | (8) 1 Acton, 333. |
| (3) (1800) 3 C. Rob. 167; 1 Eng. P. C. 289. | (9) 1 Acton, 25. |
| (4) (1799) 2 C. Rob. 128. | (10) (1904) 1 Russ. & Jap. P. C. 1. |
| (5) (1798) 1 C. Rob. 86; 1 Eng. P. C. 58. | (11) (1807) 6 C. Rob. 420; 1 Eng. P. C. 599. |
| (6) 6 C. Rob. 376; 1 Eng. P. C. 580. | (12) (1807) 6 C. Rob. 430; 1 Eng. P. C. 605. |
| | (13) (1914) 1 Br. & Col. P. C. 229. |
| | (14) (1914) 1 Br. & Col. P. C. 358. |

should be condemned as prize on the ground or grounds that at the time of seizure she was on her return passage from taking a direct part in hostilities and supplying or attempting to supply coals to warships, or to the naval forces of the enemies of the Crown, or otherwise being in the employment of the enemies of the Crown in violation of the neutrality of the ship.

Before considering and applying the law by which the case must be governed, it is essential to find the facts and to determine the nature of the conduct of the vessel and her owner and master in relation to the voyage which it is alleged rendered her subject to seizure and confiscation on her "return passage."

She belonged to the Holland Gulf Stoomvaart Maatschappij, of Rotterdam. The managing directors were the firm of Jos de Poorter, of Rotterdam, of which firm Jos de Poorter, a Dutch subject, was the sole partner. De Poorter acted throughout as her owner; and he will hereinafter be so described and treated.

The vessel was a steamship of a tonnage of 1115 tons gross and 660 net. Her speed was eight to nine knots, with a consumption of fuel of about nine tons a day. She carried a crew of about seventeen hands. She was a cargo vessel and had no accommodation for passengers. Until the outward voyage to be referred to she had been employed in a western European trade, chiefly between Holland, England, and France.

But suddenly, and without any previous negotiations of which the Court has been given any information, on October 16, 1914, her owner entered into, or purported to enter into, a time charter with a firm described as Messrs. A. M. Delfino y Hermano, of Buenos Aires, at 700*l.* per month, "to be employed in such lawful trades between any port or ports in the United Kingdom and/or Continent of Europe and America (not west) and back finally to a neutral and safe port of America (not west), or Europe as charterers or their agents shall direct."

Apparently the charterparty was signed at Rotterdam. It was signed by de Poorter, and it was also subscribed with the name of the firm of A. M. Delfino y Hermano, the charterers.

By whom the name of the latter was signed is not known. There appears to be a firm of the name of A. M. Delfino y Hermano, who carry on business at Buenos Aires as shipping agents, and they

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have acted for (among other shipowners) the Hamburg-South America and the Norddeutscher Lloyd Lines. But it may be stated at once that in the transactions relating to this vessel and her charter and voyages there is no trace in the evidence, except in name only, of any such firm, or of anything done by it, or any person representing it from first to last.

The charterparty was in evidence and can be referred to. Under it (clause 3) the charterers were to provide and pay for coals, port charges, pilotages, and loading and unloading expenses, &c. They were to pay for the hire in cash two-monthly in advance (clause 5). They had to furnish the master with all requisite instructions and sailing directions from time to time (clause 15). And they agreed to insure the steamer against all war risks for 17,000*l.* (clause 22).

The steamer left Rotterdam on October 19, bound for Newport (Mon.).

On the same day de Poorter was apparently in this country. He bought a cargo of Welsh steam coal on that date from Messrs. Agius & Co., coal merchants, at Newport, to be shipped on the vessel f.o.b.

In his answer to interrogatories de Poorter deposed that payment for the coal was received from A. M. Delfino y Hermano on or about the same day. This was a bare statement without any particulars. There was no evidence or trace of any such payment. On October 21 de Poorter made a declaration before a commissioner in London that he had made all necessary inquiries as to the ultimate destination of the coal shipped by him on the vessel, and that it was not intended for consumption "in any State at present at war with His Majesty." On the next day the vessel arrived at Newport.

In due course she loaded 1606 tons of steam coal. She also took on board 43 tons of bunker coal to add to the 100 tons already in her bunkers. This was only a comparatively small portion of the fuel required for a voyage to Buenos Aires.

The bill of lading was given on October 26. The port of delivery was Buenos Aires, and the consignees were Messrs. A. M. Delfino y Hermano or their assigns, who were to pay freight "as per arrangement." There were three bills of lading in the set. None was produced except the captain's copy. The vessel was cleared from Newport as for Buenos Aires, and sailed on October 27. In the crew list from Newport a person named L. A. Van Dongen appeared

as "steward." In the crew list from Rotterdam this man's name does not appear at all, although he shipped there. In the wage and provision list later he is entered as a "passenger." This man, it was suggested, was on board as a supercargo, and there was evidence of this which was not contradicted.

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On November 6 the vessel arrived at Teneriffe on the alleged voyage towards Buenos Aires. She could not get to her alleged destination, of course, without replenishing her bunkers. The master found it impossible to get coal for that purpose. He tried through de Poorter. The charterers, whose duty it was to supply the coal, do not appear to have been disturbed by any appeals to provide it.

For some reason (unexplained because no evidence was forthcoming for the owner, charterers, or master) the master did not venture to deplete his cargo even to the extent of giving his steamer the necessary fuel for the rest of her voyage, although the cargo coal was supposed then to have been the property of the steamer's charterers.

The vessel remained at Teneriffe (Santa Cruz) until the end of December.

Almost immediately after her arrival there the master discovered that he was suspected of having on board coals for German cruisers. According to a statement he made to Admiral de Robeck, he and the crew also, after they reached Teneriffe, had come to the conclusion that the probable object of the voyage was to coal a German warship. De Poorter wrote to the British Consul-General at Rotterdam later that the consignees (Messrs. A. M. Delfino y Hermano) gave instructions direct to the master. No evidence of any such instructions was given to the Court. Probably by reason of the failure to obtain bunker coal de Poorter instructed the master by cable about November 25 that the hire had not been paid, that the charter had therefore been cancelled, and that he should sell the coal. Various attempts were made to sell it. A contract seems to have been made through Van Dongen to sell to a Spaniard.

The log of the vessel has two pages (pp. 55—56) missing, which would have contained entries from November 23 to December 11.

Ultimately the coal was sold on December 19 to British merchants, Messrs. Hamilton & Co. Terms were made that a certain quantity

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should be left for bunkering purposes. It is unnecessary to point out in detail the inconsistent and uncorroborated accounts given in the correspondence and the answers to interrogatories of alleged arrangements made between de Poorter and A. M. Delfino y Hermano about the voyage, the payment of the hire, the cancellation of the charterparty, the sale of the coal, and so forth. They are worthless and wholly unreliable. Van Dongen left the vessel at Teneriffe. The Court was not informed what became of him. While still on the ship he appears to have advanced the master some money for expenses. The latter described him in a letter written in Dutch as "old charterer's agent" (in English and in inverted commas), and in others as the "passenger we have on board," and "our time charterer." Whether he was a Dutchman or a German was left in doubt. Whether he was acting for de Poorter or A. M. Delfino y Hermano, or both, can only be a matter of conjecture, but that his part in the transaction was not an honest commercial one is obvious.

The cargo was delivered in due course by the master to Messrs. Hamilton & Co., and was paid for by them. It was declared by the master at the time of the sale to have been the property of de Poorter.

The vessel left Teneriffe on December 30 for Madeira for orders. She was boarded by British naval officers off Funchal on January 2, 1915, and her papers were examined. The Admiral ordered her to go to Gibraltar for further examination, accepting the undertaking of the master to take her there, as there was no accommodation for a prize crew. She arrived at Gibraltar on January 6, 1915, and was again boarded by British naval officers. Her master and the papers were further examined. The boarding officer signed a certificate as follows on January 7: "I hereby certify that I have examined the papers and questioned the master of the ship about his cargo, he having been sent into this port by H.M.S. *Argonaut* for further examination. I have reported to the S.N.O. all details, and I have given the said master permission to proceed to sea."

The ship accordingly proceeded to sea on a voyage to Huelva, pursuant to orders from her owner to load a cargo of sulphur ore, shipped by the Rio Tinto Company, Limited, and consigned to the Netherlands Government on behalf of the purchasers, the Centrale

Guano Fabrieken, at Rotterdam. The charterparty had been arranged by de Poorter at Rotterdam. It was dated December 3, 1914, and it was made between his company and the Centrale Guano Fabrieken. The bill of lading was dated January 10, 1915.

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The ship called at Falmouth, arriving on January 20. The authorities at the port seem at first to have suspected the cargo of sulphur ore, but on January 23 the seizure was made on the grounds already referred to as having been set out in the writ.

I may briefly state that another ship of the same type, belonging to the same owner, the *Josephina*, carrying coals from Cardiff to Buenos Aires under a similar charterparty between de Poorter and A. M. Delfino y Hermano, started a few days before the *Alwina*, and got to various places on the South American coast, and was finally captured and condemned by the Prize Court of the Falkland Islands for carrying contraband, namely, coal, with the object of coaling German war vessels. Neither de Poorter nor A. M. Delfino y Hermano, nor the ship's master, appeared in those proceedings.

The material question of fact which I have to decide is what was the character of the outward voyage on which the *Alwina* was engaged up to the time she discharged the coal at Teneriffe.

Counsel for the Crown claimed that the evidence established that the vessel was taking a direct part in the hostilities, or that she was under the orders or control of an agent placed on board by the enemy Government, or was in the exclusive employment of the enemy Government, and that she should be regarded and treated on these grounds as an enemy vessel under art. 46 of the Declaration of London as adopted by the British Orders in Council. In any event, he claimed that if she was to be regarded as a vessel engaged in carrying contraband to the enemy she could be captured on her return voyage and subjected to condemnation for her offence on the outward voyage.

In my view, there is no evidence which would warrant the Court in finding that she came within either of the categories specified in art. 46.

It may be noted that the words "in the exclusive employment of the enemy Government" in head III. are in the official French "affrété en totalité par le gouvernement ennemi."

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The correct finding, in my view, is that the vessel, being a neutral vessel, was carrying contraband, namely, coal, intended to be delivered to enemy agents, or enemy vessels of war encountered on the voyage ; and that she was so carrying the contraband with false papers, with a suspicious supercargo, with a false destination, and in circumstances amounting to fraud in regard to belligerents. It matters not for the purpose of this decision who acted for Messrs. A. M. Delfino y Hermano, the alleged charterers and consignees and purchasers, if any one did. Their name may have been used with their consent by de Poorter for his own purposes and for his sole profit, or for the joint profit of both. What is clear is that de Poorter, the shipowner himself, was an active party in the attempt to convey the contraband to the enemy by the false and fraudulent tricks and devices which were adopted.

Upon this finding the matter of law for decision is whether the *Alwina* was subject to confiscation at the time of her seizure at Falmouth on January 23.

The general rule which has been acted upon is that when a neutral vessel carries contraband goods they are confiscable if captured in delicto ; and that the vessel also, if it belongs to the same owner, or if the owner has been implicated in a transaction veiled over with false papers or other deceitful devices, is subject to the same penalty. But when the goods have been deposited at the port or place of destination, the ship and cargo upon the return voyage are exempt from the penalty : see *The Imina*. (1) But exceptions were made at the beginning of the last century where the outward voyage was made under false papers or with a false destination, or in circumstances where the voyage had been conceived and contrived so as to deceive and practise a fraud upon a belligerent. In these latter cases the vessel and cargo have been held to be affected upon the return voyage also.

It was, however, strenuously argued before me that, according to the law of nations as now understood, the vessel and her cargo upon the return voyage are free from the risk of capture in respect of the carriage of contraband goods on the outward voyage, however that voyage was conceived or carried out.

In one aspect of the present case, no question relating to the law

(1) 3 C. Rob. 167 ; 1 Eng. P. C. 289.

applicable to the return voyage would arise. In the other it would ; and I will therefore consider the question later.

The aspect first referred to is this : The original intention of the owner was to carry contraband goods to, and deliver them to, the enemy. That intention continued until the vessel failed to obtain bunker coal at Teneriffe, and possibly until the sale to Messrs. Hamilton & Co. But, in fact, the goods were never carried or delivered to the enemy at all ; on the contrary, they were sold and delivered to a British firm. This course was no doubt forced upon the vendor. But in these circumstances, could any penalty afterwards attach to the ship arising out of the original intention and its attempted performance ?

The terms " offence " and " penalty " have often been used in reference to the carriage of contraband goods, and their use does no harm as long as it does not produce confusion of thought. But it must be borne in mind that neutral merchants have the right to supply the enemy with such goods, subject only to the risk of losing their property. Using the word " offence " in this way, it is clearly committed from the beginning of the voyage, and continues as long as it is in process of being carried out. But according to the principles of prize law, if the intention and voyage have been clearly abandoned before seizure or capture, the offence is dissipated and purged, and neither the goods nor the carrying instrument are subject to the penalty of confiscation, the delictum being over. This is the reason, I think, why no authority can be produced to the contrary. A similar principle applies where vessels have intended to run a blockade.

Two cases may be referred to in illustration of the application of the doctrine in reference to blockade and contraband respectively, even where the voyage had been abandoned, or its character changed by force of circumstances outside the voluntary intention of those responsible for the vessel and goods. Both were decided by Sir William Scott in 1807. They are *The Lisette* (1) and *The Trende Sostre*. (2)

In the latter case the vessel was carrying contraband goods to the Cape of Good Hope while it was Dutch, but was not captured as

(1) 6 C. Rob. 387 ; 1 Eng. P. C. 587.

(2) 6 C. Rob. 390, n., 392, n. ; 1 Eng. P. C. 588, 590.

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prize until after it had been surrendered and became a British possession. Sir William Scott in his judgment said :

“ If the port had continued Dutch, a person could not, I think, have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement ; and the consequence of any pre-emption that could be put upon them would be British pre-emption.

“ It has been said that this is a principle which the Court has not applied to cases of contraband ; and that the Court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction ; because the principle on which the Court proceeded was, that there must be a delictum existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made while the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer to be considered as contraband, going to the port of an enemy, it is not enough to say that they were going under an illegal intention. There may be the mens rea, not accompanied by the act of going to an enemy's port. I am of opinion therefore, that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade ; I am not aware of any cases in which the penalty of contraband has been inflicted on goods not in delicto, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded ? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached ; after that, though the intention is consummated, there is a material

defect in the body and substance of the offence, in the fact, though not in the intent.

“I am of opinion that it is a discharge, and a complete acquittal, that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy’s port.”

The same principle has been adopted and acted upon in the most recent wars by the Prize Courts of other countries. In *The Lydia* (1), tried in 1906 in the course of the Russo-Japanese war, the decision of the Prize Court of Sasebo, and of the higher Prize Court of Japan on appeal, proceeded upon the ground that a ship transporting contraband of war to an enemy port was liable to confiscation so long only as her intention to proceed to such a port had not been abandoned at the time of the capture. In *The Lincluden* (2) the Prize Court at Sasebo found that the ship had intended to take contraband goods to Vladivostok—an enemy naval base—and also that her papers were false. Nevertheless, as the result of the Court’s investigation was that the ship had actually abandoned her first object of going to Vladivostok at the time of capture, and was steaming for a Japanese port to deliver the goods there, the Court released the ship and cargo. *The Sishan* (3) is also an instance where a similar principle was applied in the case of an original intention—which was abandoned before capture—of running a blockade and delivering contraband goods at a blockaded port.

It will be observed also from the authorities and from the provisions of the Declaration of London as modified and adopted, which will be cited and considered hereafter in reference to the outward voyage of contraband cargo, and the effect upon the ship’s homeward voyage if false papers were carried on the outward voyage, that the assumption has always been that the contraband goods have been captured in delicto while upon the intended voyage to the enemy destination, or in case of a capture, of a vessel on her return or homeward voyage, that the contraband goods had actually been delivered to the enemy, or carried to the enemy destination.

Upon this aspect of the present case, I am of opinion that the result, according to the principles and rules of international law,

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(1) (1906) 2 Russ. & Jap. P. C. 341; Takahashi, 741.
359; Takahashi, 674—682. (3) (1904) 2 Russ. & Jap. P. C.
(2) (1905) 2 Russ. & Jap. P. C. 174; Takahashi, 742.

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is that inasmuch as the original intention to carry and deliver the contraband goods to the enemy had been frustrated and abandoned, and the goods themselves had been sold and delivered to other buyers when the vessel was seized, she had become freed from any liability to confiscation.

If this conclusion should be brought to the examination of the tribunal of appeal, and should not meet with approval, it may be necessary to consider the case in its other aspect.

The question argued is of substantial practical importance. It is whether, according to international law as now understood, and as it should be administered in this Court, a vessel which may have been subject to capture and confiscation for carrying contraband goods on an outward voyage remains subject to capture and confiscation upon the return voyage, if on the outward voyage the ship carried false papers, or had a false destination, or was otherwise engaged in a deceptive and fraudulent transaction for the purpose of defeating legitimate belligerent rights.

It will be remembered that in his judgment in *The Trende Sostre* (1) Sir William Scott referred to "the recent class of cases respecting the proceeds of contraband carried outward with false papers." The reported cases of that class commence about 1800 : see *The Nancy*. (2) A couple of years later (1802) the Lords Commissioners of Appeal in Prize Cases lent their high authority to the legal proposition that the carriage of contraband outward with false papers would affect the ship as well as the return cargo with condemnation : see *The Rosalia* (3) and *The Elizabeth*. (3) On reference to the record, it will be seen that the *Rosalia* had sailed outward from Hamburg in June, 1798, with contraband under a fraudulent destination to Tranquebar, but being actually destined to the Isle of France, where she delivered it. The vessel was captured on May 25, 1799, on a return voyage from the Isle of France to Hamburg. Both the vessel and the cargo (said to have been the proceeds of the outward voyage) were condemned.

As to *The Elizabeth* (3), the record shows similarly that she sailed outward from Hamburg in May, 1798, and carried contraband cargo to the Isle of France, where it was delivered, whereas her papers

(1) 6 C. Rob. 392, n.

(2) 3 C. Rob. 122.

(3) 4 C. Rob., note to table of cases.

falsely showed a destination to Tranquebar. She was captured on March 30, 1799, on the return voyage from the Isle of France to Hamburg. In this case also both the vessel and cargo were condemned. Subsequently the Lords of Appeal in *The Baltic* (1) in 1809 and in *The Margaret* (2) in 1810 regarded the matter as settled, even if the return cargo did not represent the proceeds of the outward contraband. Sir William Grant, who presided and delivered the judgment in *The Margaret* (2), said: "The principle upon which this and other Prize Courts have generally proceeded to adjudication in cases of this nature (that is where there were false papers) appears simply to be this, that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence of the Court below (which was one of condemnation of both ship and cargo) being perfectly valid, and consistent with the acknowledged principles of general law."

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It is worth noting that in that case the outward voyage had taken place over three years before the capture, the vessel being engaged in various parts from 1804 to 1807.

The doctrine of these decisions has been criticized by jurists. The criticism began early by Wheaton in 1815. He called it an innovation not founded upon principle, and argued that to subject the property to confiscation while the offence no longer continued would be to extend it indefinitely, not only on the return voyage but to all future voyages of the same vessel, which could never be purified from the contagion communicated by the contraband articles: see Wheaton's *Maritime Captures*, p. 183. This criticism has been repeated literally by many since; but it does not appear to be sound, nor does the conclusion drawn seem to be warranted.

Quite the opposite view was taken and expressed by the Supreme Court of Mr. Wheaton's own country many years later, when Marshall C.J. and Story J. were members of the Court. The Supreme Court passed under review the cases already referred to (with others) in 1834 in *Carrington v. Merchants' Insurance Co.* (3)

(1) 1 Acton, 25.

(2) 1 Acton, 333, 335.

(3) 8 Peters, 495, 521.

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Of them Story J., in delivering the judgment of the Court, said :
 “ We cannot but consider these decisions as very high evidence of the law of nations, as actually administered : and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and bona fide conduct on the part of neutrals, in the course of their commerce in times of war ; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated.”

This country in practice has certainly never given up in such cases the right of capture on the return voyage. In Wildman's International Law (1854), and in his “ Plain Directions to Naval Officers as to the Law of Search, Capture and Prize ” (1854), after the outbreak of the Crimean War, the doctrine is maintained.

In Godfrey Lushington's Manual of Naval Prize Law, published with the authority of the British Admiralty in 1866, the paragraph relating to the matter is as follows : “ A vessel which carries contraband goods becomes liable to detention from the moment of quitting port with the goods on board and continues to be so liable until she has deposited them. After depositing them, the vessel, in ordinary cases, ceases to be liable ; and therefore, as a general rule, a commander should not detain a vessel for carrying contraband goods unless he finds them actually on board. But simulated papers are an aggravation of the offence. If, therefore, a commander meets with a vessel on her return voyage, and ascertains that on her outward voyage she carried contraband goods with simulated papers, he should detain her ; and the fact that the return cargo has not been purchased by the proceeds of the outward contraband cargo makes no difference ” (p. 38).

The paragraph in the Manual edited by Mr. Holland in 1888 (paragraph 80) is in identical terms.

It is right in passing to mention the cases of *The Allanton* (1) and *The Eastry*. (2) These decisions, however, proceeded in accordance with the written Code of Prize Regulations of Russia and Japan respectively, made for that war.

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In 1908 the Memorandum issued by the British Foreign Office by way of instructions to the British delegates to the London International Naval Conference of that year (3) deals with the matter as follows :—

“(6.) A ship carrying contraband as defined in section 1 may be seized at any moment throughout the whole course of her voyage, so long as she is on the high seas or in belligerent waters. The liability to seizure is not affected by the fact that the vessel is intending to touch at some neutral port of call before reaching the hostile destination.

“When the contraband goods have been discharged the liability to seizure is at an end. In exceptional cases it has been held that a ship which has carried contraband to the enemy on her outward voyage under circumstances aggravated by fraud and simulated papers is still liable to capture and condemnation on her return voyage.”

I may finally mention that according to the present German Code if the vessel carried contraband to the enemy contrary to the indications of the ship's papers she is liable to capture and condemnation until the end of the war.

In these circumstances, whatever may have been written by jurists, I am not prepared to pronounce that the rule of international law upon the subject, which has been declared and acted upon in this country by the highest Prize Courts, as also in those of America, has ceased to be in force. The ease with which, in the circumstances of modern maritime trade, papers and destination can be falsified and frauds can be carried out in no way minimizes the obligations of neutrals engaged in such trade in time of war to act with frankness, straightforwardness, and good faith. I accordingly should hold that a vessel which had been used by

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| (1) 1 Russ. & Jap. P. C. 1. | ments respecting the International |
| (2) (1905) 2 Russ. & Jap. P. C. | Naval Conference, held in London, |
| 299; Takahashi, 739. | December, 1908, to February, 1909. |
| (3) Correspondence and docu- | [Misc., No. 4 (1909), Cd. 4554.] |

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its owner by means of false papers, with false destination, and any such deceitful practices intended to elude the right of capture by belligerents, to carry contraband goods to the enemy, and which had delivered such goods on an outward voyage, remains confiscable upon the return voyage also. What would constitute the return voyage would depend upon all the circumstances of the particular case.

I have stated my view of the law at this stage before considering the effect of the Orders in Council in reference to the provisions of the Declaration of London, by reason of the doctrines as to the force of the Orders in Council which were declared by the Privy Council in the recent case of *The Zamora*. (1) I will deal shortly with these Orders in Council. That of August 20, 1914, affected the voyage of the *Alwina* when it began. That of October 29 came into force while the voyage was still in progress, and the offence in the sense mentioned was continuing.

Art. 38 of the Declaration said: "A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end."

That provision was not ratified. It was modified by the Order in Council of August 20 by the following: "A neutral vessel which succeeded in carrying contraband to the enemy with false papers may be detained for having carried such contraband, if she is encountered before she has completed her return voyage."

For this the Order in Council of October 29 substituted the following provision: "A neutral vessel, with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage."

If the law was as I have stated, these provisions do not operate in extension of it, but, if anything, as a mitigation of the captors' rights. Therefore, according to *The Zamora* (1), they are not invalid.

It is not necessary in the present case to decide which is applicable. It is only if the vessel succeeded in carrying contraband to the enemy in the one case, or if she proceeded to an enemy port in the

(1) [1916] 2 A. C. 77.

other, that the penalty on the return, or next voyage, would attach.

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For the reasons given, in any view of the present case, as the goods were never delivered to the enemy, the vessel was immune when she was captured, and an order must be made that the owner was entitled to her restitution. By reason of his conduct, however, I order that he do bear and pay the costs and expenses of and incident to the capture and detention and also of and incident to these prize proceedings.

As it appears that the vessel was delivered up on bail, the form of the judgment will be a declaration of the right to restitution on payment of such costs and expenses, and an order that the bail be released upon such costs and expenses being paid into Court.

Liberty to admit an appeal, and to the claimant to cross-appeal on the question of costs.

Solicitor for Procurator-General: *The Treasury Solicitor.*

Solicitors for claimant: *Tarry, Sherlock & King.*

E. C. T.

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May 11.

HIGH COURT OF JUSTICE.
PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
ADMIRALTY.
(IN PRIZE.)

THE ASTURIAN.

[1914 No. 393.]

*Prize Court—Cargo—Ante-bellum Shipment—Produce of Enemy Soil—
Seizure—Neutral Claimants—Branch Office in Turkey—Domicil—
Turkish Capitulations System.*

Before the outbreak of war between Great Britain and Turkey a consignment of sultanas was shipped at Smyrna on a British vessel by the claimants, a Greek company having its head office at Athens and a branch at Smyrna, where it owned a vineyard. After the outbreak of war, the sultanas, which were the produce of the vineyard, were seized as prize on the arrival of the vessel at Liverpool.

The claimants contended that they had a neutral domicil at Athens, that the business at Smyrna was a mere branch, and that in regard thereto they were entitled to the benefit of the privileges of the Turkish Capitulations system, whereby their character as owners of the vineyard was that of neutral subjects:—

Held, that the effect of the Capitulations was irrelevant, and that, on the broad principle that the produce of land in an enemy country is subject to confiscation although shipped before war, the goods must be condemned.

SUIT FOR CONDEMNATION OF CARGO AS PRIZE.

Before the outbreak of war between Great Britain and Turkey on November 5, 1914, the claimants, the Banque d'Orient, shipped 2560 boxes of sultanas on the British steamship *Asturian* at Smyrna, consigned to their order, Liverpool, where the goods were seized on November 12, 1914. The Banque d'Orient was a Greek company with its head office at Athens. It had a branch at Smyrna, where it owned a vineyard of which the sultanas were the produce.

1916. May 4. *Sir Frederick Smith, A.-G.*, and *Pearce Higgins*, for the Procurator-General. The goods must be regarded as having an enemy character. When a merchant has mercantile concerns in two countries he is liable to be considered a subject of both as regards business transactions carried on in the respective

countries : *The Jonge Klassina*. (1) Persons domiciled in a neutral country must take immediate steps on the outbreak of war to sever their connection with an enemy firm : see *The Mannigtry* (2) and cases there cited.

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[THE PRESIDENT referred to *The Anglo-Mexican*. (3)]

The produce of enemy soil must be treated as enemy property, whatever may be the nationality of the owner of the soil : *Thirty Hogsheads of Sugar (Bentzon) v. Boyle*. (4) It is suggested by the claimants that under the Turkish Capitulations system Europeans in Turkey have certain ex-territorial rights, but whatever they may be, and assuming that Turkey has not repudiated them, they cannot affect the produce of enemy soil which is subject to the control of the enemy Government.

Leslie Scott, K.C., and *C. R. Dunlop*, for the claimants. The rule as regards neutrals resident in a neutral country with a place of business in an enemy country is that their goods shipped from the enemy country will be treated as enemy goods if the circumstances justify the attribution of enemy character to them : see *The Phoenix* (5) ; but where, as in the present case, enemy character cannot be attributed to the owners, their goods must be treated as neutral, and that applies also to the produce of land held by them. Enemy character cannot be attributed to such goods shipped before war in the absence of proof that the neutral owners have continued to carry on business in the enemy country. In the present case the branch was kept open merely to preserve the property of the bank, and there is no evidence that it continued to carry on its usual business. Under the Turkish Capitulations system the bank retained its neutral character : see the Ottoman Order in Council, 1910, No. 1184. (6) In *The Eumaeus* (7), in dealing with the status of a firm registered in the treaty port of Shanghai, his Lordship had said that, having regard to its registration as a German firm, subject to German laws under treaty with China, and with ex-territorial rights and privileges, he was of opinion "that the firm should be treated in all matters relating to the

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| (1) (1804) 5 C. Rob. 297 ; 1 Eng. P. C. 485. | (5) (1803) 5 C. Rob. 20. |
| (2) (1915) 1 Br. & Col. P. C. 497. | (6) Statutory Rules and Orders, 1910, p. 140. |
| (3) [1916] P. 112. | (7) (1915) 1 Br. & Col. P. C. |
| (4) (1815) 9 Cranch, 191. | 605, 612. |

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jurisdiction of a Prize Court in time of war as if it were established in Germany itself": see also *The Danous*. (1) The Smyrna branch of the Banque d'Orient, therefore, should be treated as if established in Greece. [*The Dree Gebroeders* (2), *The Derfflinger* No. 1 (3), and *The Lutzow* (4) were also referred to.]

Sir Frederick Smith, A.-G., in reply. The Capitulations system cannot prevent neutral property in an enemy country from having an enemy character. There is no authority for the proposition that the produce of enemy soil can be treated as anything else than enemy property. Were it otherwise, by making fictitious grants of land to neutrals Turkey would be able to carry on its trade without interruption.

Cur. adv. vult.

May 11. THE PRESIDENT (SIR SAMUEL EVANS). Part of the cargo laden on board this vessel consisted of 2560 boxes of sultanas shipped at Smyrna before the war by the Banque d'Orient, and consigned to their order at Liverpool. The said boxes were seized at Liverpool on November 12, 1914. On January 1, 1915, appearance was entered in these prize proceedings on behalf of the Banque d'Orient as the owners of the 2560 boxes. On April 19, 1915, the claim was made to the same or the proceeds thereof by or on behalf of the Banque d'Orient, on the ground that they were neutrals and were at all material times the owners of the goods.

The Banque d'Orient was a Greek company, with a head office at Athens and with a branch at Smyrna. The company carried on business as bankers and merchants. It owned and controlled land and dealt with the produce. Among other landed property, it owned a vineyard in Magnessia, near Smyrna. The sultanas claimed in these proceedings were the produce of that vineyard. They were shipped by the claimants in the steamship *Asturian* to their order at Liverpool for sale by their agents. The said land or vineyard was admittedly the property of the claimants. It was nominally held for them by some or one of their staff at Smyrna as the registered trustees or trustee on their behalf. This was a mere formality necessitated by the fact that the Ottoman Govern-

(1) (1802) 4 C. Rob. 255, n.

(3) (1915) 1 Br. & Col. P. C. 386.

(2) (1802) 4 C. Rob. 232, 235.

(4) (1915) 1 Br. & Col. P. C. 528.

ment did not allow land to be registered in the name of a foreign limited company.

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According to the affidavit of Manuel Camara, there were three registered trustees who held the land and managed it for the Banque d'Orient. But according to a letter of April 4 or 17, 1916 (which depends on the styles), and its enclosures, it would appear that the property was nominally held for them by one of their directors, Loncas, who signed what amounts to a declaration of trust, in which he declared that the property was in the indisputable possession of the Banque d'Orient, and that its registration in his name was "merely fictitious." Whatever may have been the technical form, the claimants themselves asserted that they were the real owners of the vineyard, and their claim was founded on the ownership of the land and its produce.

The argument on their behalf was in the main based upon their alleged neutral domicile, as their head office was in Athens; and the business at Smyrna was that of a mere branch, in relation to which it was said that they had the benefit of the privileges of the Turkish Capitulations system. Under this system they claimed that their position in Smyrna, and their character as owners of the vineyard, was that of neutral subjects of the kingdom of Greece. In that regard, much of the argument before me revolved round the questions of commercial domicile, and the effect of the Turkish Capitulations and their alleged abolition before the war by the Sublime Porte.

In the view I take of this case all such questions are irrelevant. The simple fact upon which the decision of the Court depends is that the goods claimed were the produce of land owned or held by the claimants in an enemy country. The law applicable is well settled, namely, that the produce of such land, while in the possession or ownership of the person owning or holding such land, even though he be a neutral and resident in a neutral country, is confiscable if captured or seized by a belligerent with whom the State where the land is situate is at war. This doctrine was declared as long ago as 1803 to have been so repeatedly decided, both in the English Prize Court and in the Court of the Commissioners of Appeal in Prize Cases, that it was no longer open to question or discussion: see *The Phoenix*. (1) It was also fully adopted and

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indorsed by the Supreme Court of the United States of America in
Thirty Hogsheads of Sugar (Bentzon) v. Boyle. (1)

This doctrine has not been doubted, and still remains in full force as part of the law of nations. It is well stated by the late Mr. Hall in the last edition of his work on International Law in this passage : " Property is considered to be necessarily hostile by its origin when it consists in the produce of estates owned by a neutral in belligerent territory, although he may not be resident there. Land, it is held, being fixed, is necessarily associated with the permanent interest of the State to which it belongs, and its proprietor, so far from being able to impress his own character, if he happens to be neutral, upon it or its produce, is drawn by the intimacy of his association with property which cannot be moved into identification in respect of it with its national character. The produce of such property therefore is liable to capture under all circumstances in which enemy's property can be seized " : Hall, 6th ed., p. 497.

The fact was relied upon by the claimants that the shipment of the goods was before the state of war existed between this country and Turkey. Upon the principle enunciated in the above passage from Mr. Hall, this fact does not affect the question of the confiscability of the goods ; and, indeed, it was expressly declared by Sir William Scott in *The Vrow Anna Catherina* (2) that the produce of land in an enemy country was subject to confiscation although shipped in time of peace.

The judgment of the Court, therefore, is that the goods claimed by the claimants must be treated as if they were enemy property, and that they were accordingly subject to seizure as lawful prize, and that they, or their proceeds, must be condemned as prize to the Crown as droits of admiralty.

Solicitor for Procurator-General : *Treasury Solicitor.*

Solicitors for claimants : *Markby, Stewart & Co.*

(1) 9 Cranch, 191.

(2) (1804) 5 C. Rob. 161, 167.

E. C. T.

[IN THE COURT OF APPEAL.]

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March 28, 29 ;
April 14.*Applied.* LAUDER v.
LAUDER. [1949] P. 277

MOSS v. MOSS.

*Judicial Separation—Cruelty—Condonation—Acts of Cruelty sufficient
to displace Condonation.*

Where a husband has been guilty of acts of cruelty to his wife which would be sufficient to entitle her to a judicial separation, the fact that she has condoned these acts by continuing cohabitation does not absolutely dispose of them. The condonation may be displaced and the cruelty revived by further acts of cruelty not in themselves sufficient to justify separation, if the Court consider that the new acts, taken together with those condoned, justify the wife in a reasonable apprehension of bodily harm.

Condonation in cases of cruelty distinguished from condonation of adultery.

THIS was an appeal from Horridge J., who had granted to the petitioner, the wife, a judicial separation on the ground of her husband's cruelty.

The arguments used before Horridge J. were in effect the same as those urged before the Court of Appeal, and his judgment was on the same grounds as that of the Court of Appeal ; it has not, therefore, been thought necessary to give a report of the case in the Court below. The following statement of facts is taken from the judgment of the Court of Appeal delivered by Phillimore L.J. :—

The marriage took place on April 30, 1905 ; there was one child, a son, born in February, 1908. The wife left her husband on November 28, 1914. Her petition was filed on February 25, 1915 ; the decree was made on December 2, 1915. The principal acts of cruelty alleged were the forcing of the wife to submit to the unnatural and bestial practices of her husband. They were stoutly denied. But the learned judge, who heard the evidence of both parties and found some corroboration of the wife's story, accepted her evidence and disbelieved the husband, and his counsel, though protesting his client's innocence, admitted that he could not hope to induce a tribunal of appeal, which had not seen the witnesses, to reverse this finding of fact. It must be taken, therefore, that the husband was guilty.

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These practices were said to have begun in 1907. There was then an interval. They began again in June, 1909, and there were attempts, at least, though often successfully resisted, through the rest of 1909 and in 1910 and 1911. The petition and particulars were silent as to any later dates. The wife deposed to attempts in the early part of 1912, but it is not certain that the judge accepted that statement. There were no further attempts after September, 1912.

Other acts of cruelty relied on were : seizing the wife by the throat and half strangling her in September, 1912 ; shaking her and snatching the hat off her head, variously stated as being in November, 1912, and November, 1913, and various instances of abuse and threats and accusations of sexual immorality down to the time of parting in November, 1914. As to all these matters Horridge J. said in general terms that he believed the wife and not the husband, and the Court of Appeal accepted his view.

The parties had lived together for about two years before they were married. In the early part of 1911 the wife underwent an operation for the uterus.

From that time forward, if not from the date of the child's birth, the wife manifested repugnance to all acts of conjugal intercourse, and the husband was frequently complaining to her and of her as to her coldness.

His business led him away travelling in various parts of the United Kingdom ; but when he returned she always met him at the station, and they slept generally in the same room, went out together, and led outwardly the lives of ordinary married people till November, 1913. About this time the husband was no doubt indignant at her coldness and was complaining to acquaintances whom he met in the train, and telling her he was doing so, and was accusing her of having other lovers before she had known him and of having others now, and telling her to go and get her living on the streets. He learnt that in his absence she had obtained a theatrical engagement as a chorus girl, and there was a violent quarrel. It ended in his writing a letter of apology dated December 3, 1913, and in their making at her instance an arrangement to sleep in separate rooms for twelve months. She also consulted solicitors, who on December 11, 1913, wrote to the husband

stating that they had been consulted as to his persistent violence and cruelty, his charges of unfaithfulness, "and other conduct of yours of a seriously improper character resulting in serious injury to her health and in her having more than once decided to live apart from you and obtain a judicial separation." The letter proceeded to state that principally out of consideration for the child she had abstained from taking this course and had assented to an arrangement for occupying separate rooms, and had with his consent accepted an engagement. That she was anxious for the child's sake to avoid anything which would embitter their relationship, and, while holding herself free at any time, she had no desire to determine the present arrangement, provided there was no recurrence of the conduct which had necessitated it. The wife said, and the judge believed her, that her health was suffering, and she left him on November 28, 1914, with his knowledge, and on an allowance of 30s. a week, which was regularly paid.

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Gordon Hewart, K.C., and *Bayford*, for the husband. It is not necessary to go into all the details of the evidence of cruelty. The parties lived together for two years after the last occasion on which cruelty was practised, so that condonation was obvious; and it will be noticed by the Court although it has not been pleaded: *Curtis v. Curtis*. (1) The Court is to act on the principles of the Ecclesiastical Courts: Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22; Rayden's Practice in the Divorce Division, p. 278. The question here is whether there has been any cruelty subsequent to 1912 which has revived the offence. The appellant contends that there has been nothing here which has revived the cruelty and that the learned judge was not justified in arriving at that conclusion; there was no offence, and no decree ought to have been made.

Vachell, K.C., and *A. M. Brice*, for the wife. Admittedly it is the duty of the Court in the public interest to say whether there has been condonation or not; *Moosbrugger v. Moosbrugger*. (2) Husband and wife were hopelessly parted, and the only question was what was the cause of that state of things. It is not admitted that the cruelty had been condoned; even sexual intercourse is

(1) (1859) 4 Sw. & Tr. 234.

(2) (1913) 109 L. T. 192.

C. A. 1916 not conclusive evidence of condonation : *Keats v. Keats*. (1) The cruelty in this case if it has been condoned has been also revived.

MOSS v. MOSS. In actions of judicial separation a smaller offence is sufficient to revive cruelty which has been condoned, although it will not revive adultery which has been condoned so as to make it ground for dissolution : *D'Aguilar v. D'Aguilar* (2) ; *Cooke v. Cooke* (3) ; *Mytton v. Mytton*. (4)

Bayford in reply. Cruelty cannot be revived after condonation except by acts which are matrimonial offences and sufficient to justify a separation for cruelty. These can only be acts causing bodily harm or a reasonable apprehension of bodily harm. [He referred to *Anichini v. Anichini* (5) ; *Evans v. Evans* (6) ; *Durant v. Durant* (7) ; and Lord Herschell's judgment in *Russell v. Russell*. (8)]

Vachell, K.C. (in reply to the new cases), cited *Kelly v. Kelly* (9) ; *Bethune v. Bethune* (10) ; *Thompson v. Thompson* (11) ; *Bosworthick v. Bosworthick*. (12)

Cur. adv. vult.

April 14. PHILLIMORE L.J., delivering the judgment of the COURT (Lord Cozens-Hardy M.R., Phillimore L.J., and Sargant J.), after stating the facts, continued : That the horrible practices to which the husband subjected his wife were acts of gross cruelty cannot be disputed. But the difficulty, which was fully present to the judge's mind, was that this ceased at latest in September, 1912, and that she continued living with him, objecting, it is true, to acts of sexual intercourse, but submitting to them, and living in all other respects an ordinary domestic married life without even a threat of leaving him till November, 1913, and without actually separating till November, 1914. It seems difficult to say that this was not condonation of the previous acts of cruelty. If so, she is driven to rely upon subsequent cruelty as reviving the original cruelty and displacing the condonation. After 1912, with the

(1) (1859) 1 Sw. & Tr. 334.

(2) (1794) 1 Hagg. Ecc. 773.

(3) (1863) 3 Sw. & Tr. 126, 246.

(4) (1886) 11 P. D. 141.

(5) (1839) 2 Curt. 210.

(6) (1790) 1 Hagg. Cons. 35.

(7) (1825) 1 Hagg. Ecc. 733.

(8) [1897] A. C. 395, 444.

(9) (1869) L. R. 2 P. & D. 31, 59.

(10) [1891] P. 205.

(11) (1901) 85 L. T. 172.

(12) (1901) 86 L. T. 121.

trivial exception of the occurrence as to the hat, there were no acts of physical violence.

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It has sometimes been thought to be the law that a matrimonial offence of sufficient gravity to warrant judicial interposition has such an effect that though it be condoned a further matrimonial offence of insufficient gravity or insufficiently proved would warrant the Court's action; that, for instance, after adultery and condonation a solicitation of chastity or a probability of subsequent adultery will be sufficient for a decree. This broad proposition has been condemned in *Collins v. Collins* (1), to which I shall make later reference. But when the matrimonial offence is cruelty a distinction may be drawn. In *Wilson v. Wilson* (2) Sir Herbert Jenner Fust, after reviewing the conduct of Mr. Wilson during the first cohabitation, and also his conduct during the last cohabitation, proceeded as follows: "It is unnecessary in such a case there should be actual violence; it is sufficient in order to revive the cruelty in the former period of cohabitation that there should be enough to justify a reasonable apprehension and well-founded ground of alarm." And in the judgment on appeal to the Privy Council delivered by Lord Brougham this passage occurs: "It is a question whether the language itself, used by him towards his wife, although not sufficient to amount to menace, does not constitute legal cruelty, because what had passed before gave a character to such language and conduct, and we have only to consider what must be the effect of the language used, accompanied by gestures, on a person acquainted with her husband's previous conduct, which was infinitely worse even than that at present complained of." And in *Cooke v. Cooke* (3) the Judge Ordinary said: "I think his subsequent conduct was sufficiently threatening to revive the offences condoned; for according to *Wilson v. Wilson* (4), *D'Aguilar v. D'Aguilar* (5), and many other cases, much less is sufficient to destroy condonation than to found an original suit." The principle on which this rests is not that condonation is conditional; for Lord Selborne in *Collins v. Collins* (6) expresses his disagreement

(1) (1884) 9 App. Cas. 205.

(3) 3 Sw. & Tr. 126, 137.

(2) (1849) 6 Moo. P. C. 484, 486,

(4) 6 Moo. P. C. 484.

488.

(5) 1 Hagg. Ecc. 773.

(6) 9 App. Cas. 228.

C. A. with Lord Penzance's directions to the jury in *Dent v. Dent* (1) and
 1916 denies that in law a condition is imported into the condonation.
 MOSS But cruelty being a matter of degree, the acts are cumulative,
 v. and you cannot separate past and present acts of cruelty in their
 MOSS. effect upon the mind and nerves of the sufferer. In *Collins v. Collins* (2) Lord Blackburn observes as follows : " I am not satisfied, either on principle or on authority, that the law of condonation is the same with respect to all matrimonial offences as it is as to adultery. Adultery is a positive fact ; either there is adultery or there is not. If there is, subject to any question that may be raised as to condonation, connivance, recrimination, or any other answer, there is an absolute right to a divorce. Where the remedy which the law allows is not divorce, but at most separation, an action for a subsequent wrong which would give rise to the same remedy is clearly not barred by the previous forgiveness. And as the question whether there ought to be a separation in general depends upon the amount and degree of the offence proved, and not merely on its species, I do not see that there is any obvious reason why the previous conduct of the parties before the condonation should not be taken into account in order to determine what is the gravity of the offence proved. It seems to me not unreasonable to say that, if there has been forbearance and forgiveness, and after that the erring spouse commits any breach of duty (whether adultery or a less grave offence), the offence is more aggravated than when committed against a spouse who has not the additional claim on the duty arising from such forbearance. That consideration cannot convert cruelty into adultery ; nor even convert solicitation of chastity into adultery ; but it might reasonably enough justify the spouse who had already forgiven so much in refusing to forgive more, and make it fit in an ecclesiastical judge who acted pro salute animae, to abandon all attempts to reconcile the parties, though the acts proved subsequent to the condonation were not in themselves (but for what had gone before) such as to render a separation necessary. Where separation is sought for cruelty this is decided : *Macfarlane v. Macfarlane*. (3) . . . In *Graham v. Graham* (4), the Lord President says, ' It is quite true that the wife condoned

(1) (1865) 4 Sw. & Tr. 105.

(3) (1849) 11 D. 533.

(2) 9 App. Cas. 235.

(4) (1878) 5 R. 1093, 1095.

these acts of violence by coming back to him. But I am not sure that "condone" is a very happy expression, because it leads one to think of the kind of condonation applicable to divorce for adultery. When an act of adultery has been condoned it is wiped out, and can never be referred to again, just as if it had never taken place; but it is not so in an action of separation on the ground of violence. When a wife comes into Court to complain that she cannot live with her husband because of acts of violence to her, and of a course of conduct that has placed her life or health in danger, she thereby opens up an inquiry into the whole history of her married life. Although acts of violence committed at an earlier period, and which have not prevented her from living with him, or going back to him after they have been separated, cannot be made the sole foundation of an action of separation, they may form the subject of investigation and proof, with a view to determine what is the true issue in the case, whether the wife can with safety to person and health live with him now.' This is a different, and I cannot but think a more solid ground than the fiction of a condition. It comes, however, to the same result."

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These cases are decisions on Scotch law. But they are authorities for us. As to cruelty and condonation, the principles are the same in both countries; for they have their origin in the canon law of Rome. As to the Scotch law, this is shown by Lord Watson in *Collins v. Collins*. (1) Our Court is bound by s. 22 of 20 & 21 Vict. c. 85 to follow in such matters the principles and rules of the Ecclesiastical Courts, and it is clear that in these matters the Ecclesiastical Courts also adopted the canon law of Rome, which was received as the canon law of England for these purposes.

Perhaps it is not necessary to make a sharp and definite exception of cruelty or to say that in complaints of cruelty a matrimonial offence insufficient in itself will displace condonation sufficiently to entitle the sufferer to a decree. For in truth when a course of conduct is to be considered it is impossible altogether to dissociate present conduct from the past, and acts not so grievous in themselves may nevertheless operate grievously on the mind of the sufferer either as recalling past acts of violence or as causing fear

(1) 9 App. Cas. 244.

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of their recurrence. That being so, and accepting the view taken by Horridge J. of the credibility of the two parties, I think, though not without some hesitation and much reflection, that his judgment should stand.

The husband during the latter part of 1913 and during 1914 till his wife left him was insisting upon sharing the same room and generally the same bed, and was pressing upon her the renewal of that conjugal intercourse which she by reason of his past practices either loathed or feared, or perhaps I might say both loathed and feared. He resented her unwilling submission and ultimate refusal; and his resentment led him to use reproaches and abuse, to accuse her of unfaithfulness, to tell her he had discussed it with other persons, to call her by vile names and urge her to go upon the streets and threaten to send her there. This abuse had possibly an additional sting, because her past life had not been without reproach. This conduct, as the learned judge has found, was persisted in and was affecting her health. And this is sufficient. The case of *Russell v. Russell* (1) does not impugn in any way the principles laid down by the Judge Ordinary and approved by the Full Court in *Kelly v. Kelly*. (2) To use the language of Lord Davey in *Russell v. Russell* (3), which is in harmony with that of Lord Herschell, protection is given "to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health"; while in a later passage he explains that he refers to mental as well as physical health. The other noble and learned Lords who formed the majority agreed with these judgments. *Mytton v. Mytton* (4) and *Bethune v. Bethune* (5) are useful instances of the application of this doctrine by Courts of first instance. A course of conduct creating mental distress and anxiety and thereby injuring bodily health amounts to cruelty. This is, I apprehend, that which the learned judge found to exist and upon which he founded his decision, and I think it must be affirmed, and that this appeal must be dismissed with costs.

Solicitors: *Cohen & Cohen; Edwin Herrin & Co.*

(1) [1897] A. C. 395.

(3) [1897] A. C. 468.

(2) L. R. 2 P. & D. 31, 59.

(4) 11 P. D. 141.

(5) [1891] P. 205.

J. R. B.

ROE v. ROE.

1916

May 4.

Desertion—Deed of Separation—Breaches by Husband—No Repudiation of Deed by Wife—Plea of Desertion not established.

A separation by deed implies consent of the parties and negatives desertion. If one party fails to pay the allowance provided by the deed, and the other, relying upon the deed, takes steps to enforce payment thereunder, the latter cannot successfully plead desertion.

THIS was an undefended petition by the wife for divorce on the grounds of adultery and desertion.

The parties were married in 1901, and there were two children issue of the marriage.

In December, 1903, a deed of separation was executed, the husband covenanting to pay the wife an allowance; but since April, 1911, he had paid nothing under the deed.

In 1915 the husband, who had for some time been abroad, went to Scotland, and the wife sued him there for arrears of the allowance under the deed. The husband pleaded the repudiation of the deed, but the Court gave judgment for the petitioner.

Later the petitioner found that the respondent was living in adultery in London, and the present petition was presented in February, 1916. The respondent did not appear.

In the course of her evidence the petitioner told the Court that she never desired to repudiate the deed.

J. Harvey Murphy, for the petitioner, submitted that the respondent had repudiated the deed by failing to keep up the payments, and that desertion for two years and upwards was complete before the petitioner obtained judgment in the Scotch Court. He relied on *Hussey v. Hussey*. (1) He also referred to *Tress v. Tress* (2) and *Kennedy v. Kennedy*. (3)

SHEARMAN J. I do not think that the case of *Hussey v. Hussey* (1), as reported, contains a full statement of the law. It is clear in that case that both the parties treated the deed as a nullity.

(1) (1913) 29 Times L. R. 673. (2) (1887) 12 P. D. 128.

(3) [1907] P. 49.

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In my opinion, the petitioner in the present case cannot succeed on the plea of desertion. The general principle underlying these cases is that desertion must commence by a separation brought about by one party against the consent of the other party, and that if they separated by consent there cannot be desertion. Having separated by consent, if the document or contract under which they so separated comes to an end, then from the moment when it comes to an end, either by express agreement or by conduct which puts an end to the agreement or contract, the status conferred by it comes to an end also. But, unless both parties treat it as a nullity, the original rights and status cannot arise.

In my view, the decisions in *Tress v. Tress* (1) and *Kennedy v. Kennedy* (2) and a number of other cases lay down the proposition that if, as a matter of fact, both parties have treated the deed as a nullity, then either of them is at liberty to disregard it and to insist upon the original status and rights.

In the present case, so far from treating the deed as a nullity, the wife has said that she always tried to get what money she could, and that, even recently, she tried to enforce payment in Scotland. This being so, I cannot hold that there was any date or period at which desertion in law began.

The wife, having proved a case of adultery against her husband, would be entitled to a decree of judicial separation if she chose to ask for it. I accede to the suggestion that she shall have leave to amend her petition by pleading cruelty ; and, in the meanwhile, the case will stand over.

Solicitors for petitioner : *Hatchett-Jones, Bisgood, Marshall & Thomas, for Bolton & Davidson, Bristol.*

(1) 12 P. D. 128.

(2) [1907] P. 49.

H. D. G.

THOMPSON v. THOMPSON.

1916

May 8, 9.*Divorce—Separation Deed.*

A husband was guilty of cruelty to his wife, and this led to a separation by deed. The deed contained a covenant not to sue for any offence before the date of its execution, but with a proviso that this and all the other covenants should become void in the event of a judicial separation being pronounced. The husband committed adultery after the date of the deed, and the wife petitioned to have the marriage dissolved :—

Held, that it would not be just or reasonable to put the petitioner to the expense, delay, and inconvenience of a second suit, based upon the same evidence of cruelty and adultery ; and that upon her present petition, founded upon adultery since the date of the deed, coupled with the previous cruelty, both of which offences were proved to the satisfaction of the Court, she was entitled at once to a decree nisi.

Bourne v. Bourne [1913] P. 164 approved and followed.

Lipman v. Lipman, ante, p. 25, dissented from.

THIS was a suit by the wife for dissolution of marriage on the grounds of cruelty and adultery. There was no defence by the husband.

The parties were married on April 17, 1911, and separated in September, 1914.

The deed of separation, which was dated September 10, 1914, contained (inter alia) the following covenant : “ That she ” (the wife) “ will not commence any proceedings against her husband in respect of any misconduct or other offence or alleged misconduct or offence which she may allege to have been committed or permitted previous to the date of these presents.”

There was a further provision in the deed that “ in case the husband and wife shall at any time hereafter with their mutual consent cohabit as man and wife or shall be judicially separated then and in such case all the covenants hereinbefore contained shall become void.”

The present petition, which was filed on behalf of the wife on February 26, 1916, alleged cruelty before the date of the deed and adultery since the date of the deed.

1916 *Le Bas*, for the petitioner. The petitioner is not commencing proceedings in consequence of something which has taken place before the deed. She is only able to commence proceedings at all by reason of what has taken place since the date of the deed, namely, the adultery of the respondent. This, it is submitted, revives the previous and condoned cruelty. This case is very different from *Rose v. Rose* (1), where the words were of the widest possible character—much wider than any words in the present deed. In *Bourne v. Bourne* (2) there was express condonation in the deed. In *Lipman v. Lipman* (3) the covenant was not to take any proceedings at all of any kind.

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A decree nisi should be pronounced forthwith, following the decision of Sir Samuel Evans in *Bourne v. Bourne* (2)—not merely a decree of judicial separation on the ground of the respondent's subsequent adultery, as was pronounced by Horridge J. in *Lipman v. Lipman*. (3) [He also referred to *Dowling v. Dowling* (4), *Kennedy v. Kennedy* (5), and *Tress v. Tress*. (6)]

Cur. adv. vult.

May 9. SHEARMAN J. In this case I find as a fact that the respondent was guilty of cruelty towards the petitioner before September 10, 1914, and that his conduct led to a deed of separation which was entered into on that date. I also find as a fact that the respondent committed adultery since the date of the deed.

The petitioner has now brought this suit, and prays that her marriage may be dissolved on the grounds of cruelty and adultery. I have to consider what relief she is entitled to under the circumstances.

It was decided by the Court of Appeal in *Gandy v. Gandy* (7), overriding the judgment of the President (Sir James Hannen),—and the principle was confirmed in *Rose v. Rose* (1)—that where a deed of separation had been entered into, containing covenants in a certain very stringent form not to sue for past offences, subsequent

(1) (1883) 8 P. D. 98.

(2) [1913] P. 164.

(3) Ante, p. 25.

(4) [1898] P. 228.

(5) [1907] P. 49.

(6) (1887) 12 P. D. 128.

(7) (1882) 7 P. D. 168.

adultery did not revive and entitle the petitioner to set up those past offences.

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—
Shearman J.

I have very little doubt that a different form of separation deed has generally been adopted since then in consequence of those decisions, and especially of the decision in *Rose v. Rose*. (1) A form of separation deed has come into common use in which a clause like that which was construed in *Rose v. Rose* (1) is followed by another clause providing that if the parties should be judicially separated the preceding covenants of the deed should be void.

Two points have been raised on the present deed : the first, that the clause here is very different in its effect from that in *Rose v. Rose*. (1) I have come to the conclusion, with some hesitation, that that contention cannot prevail, because I think that this is a suit in respect of—albeit not wholly in respect of—an offence committed prior to the date of the deed.

The second point argued is that the petitioner is entitled to a dissolution in spite of the covenant that the wife should not commence any proceedings in respect of previous misconduct because the facts show that she is entitled to a decree under which that covenant becomes void.

Upon this point there is a conflict of authority in cases recently decided. In *Bourne v. Bourne* (2) the President expressed a decided opinion that he might make a decree by taking what has been described as a short course, holding that it was useless to make a decree of judicial separation and then to follow that up by a decree nisi on precisely the same evidence.

In *Lipman v. Lipman* (3) Horridge J. declined to follow the dicta of the President in *Bourne v. Bourne*. (2) These cases refer to a different ground of decision in that the deed could be ignored because not pleaded, but it is my duty to express my opinion of these conflicting views.

I think it clear that, whether the deed is pleaded or not, the Court ought to consider it, and it is the duty of counsel, as was done in the present case, to call attention to it. When the deed is pleaded the Court must look not merely to what defences may arise on the deed, but also to what reply there may be to those

(1) 8 P. D. 98.

(2) [1913] P. 164.

(3) Ante, p. 25.

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defences, and which might prevail against the restrictive clauses in the deed.

Now here it is clear that although this lady bound herself not to commence proceedings by reason of previous cruelty, yet, the moment adultery was committed by the husband, she had the right to say "I am in a position to claim a judicial separation," and, if duly pleaded, the facts seem to me, in essence and in substance, to constitute a reply to the defence founded upon the deed.

The petitioner ought not, in my opinion, to be put to the expense, delay, and inconvenience of a second suit based upon precisely the same facts and evidence; and, personally, I think there can be no objection to what has been termed the short course. I prefer to follow the reasoning and decision of Sir Samuel Evans, and not that of Horridge J.

The petitioner is clearly entitled to a decree for judicial separation, and therefore the Court can say, there being facts proved which entitle her to have her marriage dissolved, the straight course is to pronounce that decree at once. I therefore pronounce a decree nisi, with costs, and order that the petitioner may have the custody of the child of the marriage.

Solicitors : *Gibson & Weldon, for H. A. Pickup, Blackpool.*

H. D. G.

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

1914
Dec. 14.

ADMIRALTY.

(IN PRIZE.)

THE JUNO. (1)

[1914, No. 138.]

Prize Court—British Vessel—Enemy Cargo shipped before War—Interruption of Voyage—Seizure in Port after Declaration of War.—Incapacity of Ship and Cargo to proceed—Claim by Shipowners for Freight and Expenses—Considerations affecting Amount to be allowed.

A British vessel, shortly before the outbreak of war between Great Britain and Germany, left Bristol for Amsterdam with three parcels of cargo ultimately destined for Germany, and put into Swansea to load other cargo. Whilst there, and after the outbreak of war, the three parcels were seized by the Customs authorities, and subsequently condemned as lawful prize. The shipowners thereupon raised a claim for freight, and also for expenses incurred by reason of the detention of the vessel owing to the seizure of the goods:—

Held by the President (Sir Samuel Evans), that the claim to some freight, and to the items for extra costs of discharging and shifting the goods at Swansea, should be allowed against the cargoes, and, in ascertaining the total amount, the following general rule would assist the registrar and merchants in this and similar cases.

Such a sum to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (though this is not necessarily conclusive), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery; but no sum to be allowed (unless there be some special and exceptional circumstances) in respect of any inconvenience or delay attributable to the war or to the consequent diversion, detention, and seizure, as such matters are the unfortunate results of a state of war to which those engaged in shipping must submit.

SHORTLY before the outbreak of hostilities between Great Britain and Germany three portions of cargo were shipped upon the British steamship *Juno*, at Bristol, consisting of about ten tons of red

(1) The three cases here grouped together, namely, *The Juno* (see above), *The Kalomo* (note on p. 176), and *The Katwijk* (post, p. 177), cover the question of the allowance of freight and/or charges to the shipowner on cargo seized as prize.

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earth, about one and a quarter to one and a half tons of tin alloy, and nearly 500 tons of strontium in bulk. The ship proceeded from Bristol to Swansea, and there remained, by the action of those responsible for the ship itself, for some time to await political developments, and ultimately, after the outbreak of war, the three parcels of goods were seized by the Customs authorities, on behalf of the Crown, as enemy cargo.

On the application of the Crown for condemnation of this portion of the cargo no claimants appeared in respect of the red earth, or the strontium ore ; but, in respect of the tin alloy, an appearance was entered, as owners, by Capper, Pass & Son, Limited, of the Bedminster Smelting Works, Bristol. The owners of the ship, the Bristol Steam Navigation Company, Limited, also put in a claim for freight, and for landing and other charges at Swansea in respect of all three parcels of cargo.

As to these parcels being enemy cargo subject to seizure, no difficulty arose in respect of the red earth, or the strontium, as the evidence, in the opinion of the learned President, left no doubt that these two portions of cargo were enemy property, and, therefore, properly, after the outbreak of war, the subject of seizure in port at Swansea by those acting for the Crown ; but, with regard to the tin alloy, Capper, Pass & Son alleged that they were the sole owners as the property had not passed to the purchasers, Küppers Metallwerke, German subjects, of Bonn in Germany. At the hearing the correspondence between the parties in respect of the transaction was put in, from which it appeared that the sellers, Capper, Pass & Son, had been in the habit of supplying tin alloy to the purchasers, Küppers Metallwerke, long before the outbreak of war. The particular transaction leading up to the shipment of the goods in question began on July 17, 1914, when the sellers wrote to the buyers offering them one ton tin alloy @ 84*l.* net c.i.f. Hamburg, Rotterdam, or Antwerp. This offer was accepted by the buyers on July 20, and, on July 27, 1 ton 1 qr. 18 lbs. of tin alloy was shipped on board the *Juno* for Amsterdam, the invoice sent to the buyers amounting to 85*l.* 3*s.* 1*d.*

With reference to this shipment the learned President (Sir Samuel Evans), in delivering judgment on November 30, 1914, said :

“ I think that the property clearly had passed from the sellers to

the buyers upon the goods being placed on board the ship. The bill of lading was not made out to the order of the shippers; but to the order of the purchasers—the consignees. There was no intention on the part of the sellers to reserve any power of disposition over the goods comprised in the bill of lading. The sole object of sending the bill of lading through a bank instead of direct to the customer was to give some leverage in securing the payment of the account. The property having passed in this transaction from the sellers to the buyers at the time of shipment at Bristol, the goods were, at the time of seizure, the property of the German enemy subjects. I dealt with the authorities in the judgment I pronounced in the case of *The Miramichi* (1), and it is enough for me to say that, according to the authorities, I am clearly of opinion that the property had passed from the sellers to the buyers, and that being so, it being enemy property, it was properly the subject of seizure by the Customs authorities at Swansea.

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“I, therefore, condemn all these three cargoes as prize, to which the Crown are entitled as droits of admiralty on their seizure in the port of Swansea.”

A. D. Bateson, K.C., and R. H. Balloch, for the Crown.

T. W. H. Inskip, K.C., for the claimants Capper, Pass & Son, Limited.

C. Robertson Dunlop, for the shipowners, the Bristol Steam Navigation Company, Limited.

With reference to the claim of the Bristol Steam Navigation Company for freight and sundry charges the learned President deferred judgment.

Cur. adv. vult.

1914. Dec. 14. THE PRESIDENT (SIR SAMUEL EVANS). The steamship *Juno* is a British vessel. It belongs to the claimants, the Bristol Steam Navigation Company, Limited.

On July 28, 1914, certain cargoes consisting of (1.) red earth, (2.) tin alloy, and (3.) strontium ore were shipped on board the *Juno* at Bristol. The cargoes were destined ultimately for various places

(1) [1915] P. 71.

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in Germany; but the sea voyage destination in each case was Amsterdam. After leaving Bristol the vessel called at Swansea to load other cargo. She finished her loading there on August 1, and was then ready to proceed on her voyage. Her owners, however, decided to delay her departure owing to the fear of complications on the Continent.

While the vessel still lay at Swansea the cargo of red earth was seized as enemy goods on August 20, and the cargoes of tin alloy and strontium ore on August 24.

In these proceedings I have already condemned these cargoes as lawful prize. Thereupon the steamship company, as owners of the vessel, claimed the freight due in respect of the goods, and other expenses and losses resulting from the seizure.

This claim is the matter remaining for adjudication. The claim as originally put forward has been amended.

I accept the final affidavit of Mr. Taylor, the manager of the company (sworn on November 26 last), in proof of the arrangements and circumstances in which the goods were shipped; and therefore I need not discuss various questions which were argued as to the contracts of affreightment and bills of lading. The claim as amended is set out in the affidavit.

The company claim the full freight as having become due on shipment. Alternatively they claim the full sum because, "although the goods were only carried from Bristol to Swansea, the detention of the ship at Swansea, owing to having the goods on board, cost the company more than if the *Juno* had performed the voyage in the ordinary course." They also claim extra costs of discharging and shifting the goods at Swansea.

Various reported cases were referred to in argument which related to claims by captors of ships for freight against owners of cargoes, and to claims by shipowners for freight against captors or seizers of cargoes. These were all cases of neutral vessels. In none of them were British ships concerned. And counsel for the claimants said that he had not been able to find any cases relating to British vessels dealing with the same subject.

The position of the sea-carrying commerce of this country was very different a hundred years and even fifty years ago from that of our own day. I have only come across one case reported in the English

Prize Court affecting a British vessel in which somewhat similar questions arose ; but that was a case between the owners of a ship, captured and afterwards recaptured, and the owners of cargo, and not between shipowners and captors—*The Friends*. (1)

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I have considered all these cases. It would be wrong to say that their consideration has not been helpful. Nevertheless, they are not decisions on the points now before me. The questions I have to determine in the present case come before the Court for decision for the first time, so far as I am aware. While there are no rules of law or decisions to bind or guide the Court, the problems can, I think, be solved without great difficulty by a rational application of fair and equitable considerations. The Prize Court has always claimed to exercise equitable jurisdiction, using that term in its broadest sense, and not in its more technical Chancery meaning.

Counsel for the claimants contended that they were entitled to the full freights for two reasons : (1.) because by the contracts the freights were due on shipment ; and (2.) because, as in the case of neutral ships in former days, capture was said to be regarded as delivery, and full freight was given to neutral shipowners, so it should be given to British shipowners.

For the Crown it was contended that no freight should be allowed, or if any, not the whole freight, because an incapacity attached to the ship in the present case, as she was prevented by law from performing her contract to deliver the goods to the consignees, and because the non-completion of the voyage was not due solely to the "incapacity of the cargo to proceed."

The short answer to the first contention of the claimants is that there is no contract to which this Court can look which is applicable to the existing facts. This Court has no concern, touching the matter now in question, with the contracts between the shipowners and shippers, or cargo owners. Whatever claim the shipowners may have under their contracts is not taken away by the decision of this Court. By the very facts of the situation the shipowners could not perform their contract by carrying the enemy goods to their destination.

As to the second contention, a neutral vessel and a British vessel are not in the like case or condition. Even before the Declaration

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of Paris a neutral vessel had the full right to carry enemy goods into an enemy country subject to the risk of her detention by a belligerent for the purpose of seizing the goods, and this was the foundation of the principle which, generally speaking, secured to them their full freight.

It is needless to cite the many cases in which the doctrine was applied, or in which exceptions were made. But I will quote from two of the latest cases in which Lord Stowell dealt with the matter, and laid down the principle. In *The Fortuna* (1): "The general principle has been stated very correctly, that where a neutral vessel is brought in, on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo." And in *The Prosper* (2): "In this Court it is held, that where neutral and innocent masters of vessels are brought into the ports of this country, on account of their cargoes, and obliged to unliver them, they shall have their freight, upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. This rule was introduced for the benefit of the shipowners, and to prevent the rights of war from pressing with too much severity upon neutral navigation."

Since the Declaration of Paris, and indeed before that, by the practice adopted in the Crimean War, neutral vessels laden with enemy goods could not be prevented from continuing their voyages and so earning their freight except where the goods were contraband, or where the pursuit of the voyage would amount to a breach of blockade; and in these cases no freights would be allowed.

With British vessels it is quite otherwise. They must not carry enemy goods, nor proceed on voyages for which such goods were shipped. In the present case there was accordingly an "incapacity to proceed" attributable not only to the cargo, but also to the ship.

It would not be right, however, in my opinion to withhold from the shipowners all the freight, on account of the "incapacity of the ship," where the shipment took place before war, and the voyage was partly accomplished.

(1) (1809) Edw. 56, 57; 2 Eng. P. C. 17, 18.

(2) (1809) Edw. 72, 76; 2 Eng. P. C. 25, 26.

What then ought to be the rule ? It is possible that even if the cargo is not carried to its destination it would be just in some cases that the whole amount of the freight should be paid. For instance, suppose an enemy cargo were shipped before the war from Australia for Hamburg, and was seized near British waters and taken to Bristol, it may be that it would be fair to pay the shipowners the full freight. On the other hand, suppose a cargo of enemy goods had been shipped before the war from Bristol and destined for the Cameroons, or Kiao Chau, and was seized as in this case at Swansea, it would be wholly inequitable for the shipowners to claim, or for the captors to be subject to, payment of the full freight, even though by the contract it was due on shipment at Bristol.

In the present case, where only a comparatively small part of the voyage was made, I think the whole freight ought not to be allowed. What part should be allowed I will refer to the registrar and merchants to say. But I must give them some direction or guidance, although no strict rule can be laid down which would be universally applicable. Cases differ greatly. The phrase *pro rata itineris* has been used in some cases ; but this does not import a mere arithmetical calculation of distances or times.

The only rule which I propose to state for the guidance of the registrar and merchants is this : Such a sum is to be allowed for freight as is fair and reasonable in all the circumstances, regard being had to the rate of freight originally agreed (although this is not necessarily conclusive in all cases), to the extent to which the voyage has been made, to the labour and cost expended, or any special charges incurred in respect of the cargo seized before its seizure and unlivery, and to the benefit accruing to the cargo from the carriage on the voyage up to the seizure and unlivery ; but no sum is to be allowed in respect of any inconveniences or delay attributable to the state of war or to the consequent detention and seizure.

I am conscious that the rule is not precise—I doubt whether any precise rule could be laid down—but, such as it is, I am satisfied that the experience of the registrar and merchants will enable them to apply it so as to bring about a fair and satisfactory result. As to the items for extra costs of discharging and shifting the goods at

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1914 " Swansea, I think these should go against the cargoes and should be allowed. (1)

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I have said that the claimants in the affidavit in support of their claim urged that the detention at Swansea should be taken into account, and that it would amount to the whole freight.

In this particular case the fact is that the owners themselves, according to Mr. Taylor's affidavit, on August 1 "decided, owing to the political situation on the Continent, to keep the *Juno* at Swansea and to await developments."

Apart from this, and as the point will no doubt arise in future cases, I desire to pronounce as my opinion that no sum ought to be allowed, unless there be some special and exceptional circumstances, in respect of any delay or inconvenience which may occur to a ship as the necessary result of her diversion or detention for the purpose of seizing and making unlivery of confiscable enemy cargo. Such things, and their consequent losses, are some of the unfortunate, albeit minor, results of war to which those engaged in shipping have to submit, as other citizens must in other capacities and walks of life.

I allow the claim to some freight, and to the special items mentioned, and order a reference to the registrar and merchants to ascertain the amount.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for claimants Capper, Pass & Son, Limited: *Tanner & Clarke, Bristol.*

Solicitors for shipowners: *Holman, Birdwood & Co.*

(1) In the case of the British ship *Kalomo* [1915, No. 247], in which the learned President delivered judgment on May 7, 1915, the vessel was diverted by the Admiralty to London when on her way to Rotterdam, with a cargo of lumber consigned to Rotterdam from Nashville, Tennessee. A large portion of the cargo was released by the Procurator-General, on payment of the freight, leaving about one-fifth of the cargo condemned as prize. In these cir-

cumstances a further direction was given to the registrar and merchants to ascertain what was the total amount of the special costs incurred in respect of the whole cargo in order to determine, subject to review by the Court, the extent of the liability of the Crown toward the shipowner in respect of those charges upon the condemned portion of the cargo. The case was ultimately settled out of Court.

T. L. M.

IN THE HIGH COURT OF JUSTICE.
PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

1915
May 17.

ADMIRALTY.

(IN PRIZE.)

THE KATWIJK.

[1914, No. 291.]

Prize Court—Neutral Ship—Cargo declared Contraband after starting on Voyage—Freight—Demurrage.

On September 16, 1914, a neutral (Dutch) vessel left a neutral (Spanish) port for a neutral destination (Rotterdam) with a cargo of iron ore shipped by a Spanish firm and consigned to a Dutch firm. On September 19, when off the Isle of Wight, the vessel was stopped by a British warship and sent into a British port for examination. On September 21 iron ore, which had been declared free, was made conditional contraband, and, on October 4, the cargo was seized as prize, on the assumption that it was intended for ultimate delivery to Krupp's in Germany. To discharge the cargo the vessel was sent to Middlesbrough, where she was released :—

Held by the President (Sir Samuel Evans), that the cargo could be properly condemned as the seizure took place after iron ore had been declared contraband ; but the shipowners were, in the circumstances, entitled to freight, though not to demurrage, as the temporary detention of a neutral vessel by a belligerent was an unfortunate result of a state of war.

APPLICATION by the Procurator-General, on behalf of the Crown, for a decree of condemnation in respect of a quantity of iron ore laden upon the steamship *Katwijk* and seized as contraband.

The *Katwijk* was a Dutch vessel, registered at Rotterdam, and on September 16, 1914, after the outbreak of war between Great Britain and Germany, left Decido, a port near Bilbao in the north of Spain, with 3350 tons of iron ore, destined, it was asserted on behalf of the Crown, for Krupp's works at Essen, under a bill of lading of the same date making the cargo deliverable at Rotterdam to the order of Ruys & Co., a Dutch firm alleged to be agents of Krupp's. On September 19 the vessel was stopped in the Channel by a British war-vessel and sent to Portsmouth for examination, and then round to Middlesbrough, where she was released after discharging her cargo, which, on October 4, had been seized as prize.

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There was no application to condemn the ship, and no appearance was entered for the cargo ; but the shipowners put in a claim for freight and demurrage.

1915. May 17. *Sir John Simon, A.-G.*, and *Stuart Bevan*, for the Crown. By the Proclamation of August 20, 1914, it was announced that, during the present hostilities, the provisions of the Convention signed on February 26, 1909, and known as the "Declaration of London," would be adopted with additions and modifications. (1) On September 21, 1914, by Order in Council, certain additional articles were specified as conditional contraband, and as these included iron ore, the seizure took place after the date of the Order, and was, therefore, properly made, notwithstanding the suggestion that cargo laden on a neutral vessel cannot be condemned when it has only been declared contraband after the vessel has commenced her voyage.

With regard to the freight, claimed by the shipowners, it is submitted that this Court will not order payment to be made to the ostensible Dutch owners, the evidence indicating that, for all practical purposes, the vessel was owned by Messrs. Krupp, and was carrying materials for their works with the obvious intention of being used as munitions of war by the enemy. [The case of *The Roumanian* (2) was referred to.]

C. Robertson Dunlop, for the shipowners. The *Katwijk* was a Dutch ship, owned by a Dutch company, and started on her voyage from Spain on September 16, 1914, that is, before there was any declaration that iron ore was conditional contraband ; in fact, the Executive in Council, under date of August 20, had given public notice to neutrals that ore would be free, that is, that they would, in that respect, adopt art. 28 of the Declaration of London.

In these circumstances, it is submitted that it is immaterial whether there was any connection between Mr. Dekkers, of the firm of Erhardt & Dekkers, managers of the steamship company, and Messrs. Krupp. The goods were shipped on board a neutral ship, and, unless they were contraband, the ship was engaged in a

(1) The Declaration of London Government. See White Paper Orders in Council were subsequently withdrawn by H.M. issued July 14, 1916.
(2) [1915] P. 26.

perfectly legitimate trade. By the charterparty dated September 10, 1914, between the Maatschappij Steamship Company, the owners of the ship, and Messrs. Ruys & Co., merchants and shipbrokers of Rotterdam, the *Katwijk* was to proceed to Decido, near Bilbao, in the north of Spain and there load a complete cargo of iron ore for Rotterdam on being paid freight at the rate of 6s. 9d. per ton. The bill of lading also shows that the destination of the goods was Rotterdam, and both charterparty and bill of lading show neutral shippers of cargo on a neutral ship consigned to neutrals at a neutral port.

It is further submitted that September 19 was really the date of seizure, for the vessel on that date was stopped in the course of her voyage to Rotterdam, and was accompanied into Sandown Bay by a war-vessel, a naval officer being put on board and the vessel detained whilst the cargo was being examined. The cargo was not contraband when the vessel left Spain, and there is no ground for depriving the shipowners of their freight. They are, I suggest in addition, entitled to some compensation in the nature of demurrage to cover the expenses attending the detention of the vessel for a month in the Isle of Wight before she was ordered, on October 19, to Middlesbrough to discharge her cargo.

THE PRESIDENT (SIR SAMUEL EVANS). In this case the Crown seeks for a decree of condemnation of 3350 tons of iron ore, which was a cargo laden upon the Dutch ship *Katwijk*, and which was seized in September, 1914. There has been some discussion as to when the cargo was definitely seized. Nobody appears for the owners of the cargo. Nobody claims the cargo; but counsel acting for the ship suggested that the seizure was before September 21.

I decide upon the evidence afforded by the affidavits which have been read by the Attorney-General that the cargo was not seized before September 26. It is not necessary for me to go further and declare whether it was in fact seized on September 26, or on October 4. If it was not seized until September 26, then, by that date, the Proclamation of September 21 had been issued, in which it was declared that iron ore would be regarded as contraband. It is within the power and function of the Crown to add to the list of

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contraband from time to time, and, acting in pursuance of the undoubted power vested in the Crown, this Proclamation was issued on September 21. I therefore decree the condemnation of this cargo as contraband, seized after the Proclamation was issued.

Now a claim has been put forward by the owners of the ship for freight and other sums of money which they call demurrage or damages for detention. The ship belongs to a Dutch company. It is admitted that she sailed upon this voyage on September 16 carrying this cargo, which was not then contraband. Therefore she started upon a perfectly innocent voyage. According to the principles laid down in the Declaration of London the ship could not be condemned by reason of the cargo being declared contraband after starting on the voyage. Prima facie, therefore, the owners of this ship, the Dutch company, would be entitled to some freight. The Attorney-General, however, has pointed out certain facts with reference to the firm of Messrs. Erhardt & Dekkers, and with regard to the position of Mr. Dekkers himself, and the relationship which they apparently had in business with Messrs. Krupp. Whatever their position was at the time when they started upon this voyage intending to carry this cargo, I doubt not to Messrs. Krupp, for the purpose of being converted into munitions of war, they do not seem to have been on very friendly terms with the German Government afterwards, because I am told that this ship was subsequently torpedoed by one of the German torpedo-boats. I do not know whether they knew that she was a ship belonging to Messrs. Erhardt & Dekkers, who had been in close business connection with Messrs. Krupp's firm. Now is there enough before me to displace the prima facie claim which these people have, as owners of the ship, for freight? It is to be observed that at this time there is no reason whatsoever why Messrs. Erhardt & Dekkers should not be engaged in business transactions with Messrs. Krupp and should not make a profit out of them if they could, and I see no reason here for depriving the owners of this neutral vessel of such freight as ought, in all the circumstances of the case, to be given to them. The amount of freight will be decided upon reference to the registrar and merchants, regard being had to all the circumstances, some of which I have pointed out in the case of *The Juno*. (1)

(1) Ante, p. 169.

With regard to the further claim for demurrage or detention, I disallow it. This vessel, like other vessels, ran some risk. I have no doubt that if the matter was considered at all, the master, or the charterers, might very well have said: "Well, we are starting on an innocent voyage now, but we wonder whether iron ore will be added to the list of contraband before we reach Rotterdam"—as it, in fact, was. Now such detention as they were put to, such loss as occurred to them by reason of that detention, is part of the inconvenience and loss which unfortunately have to be suffered by even neutrals in the dire circumstances of war.

I therefore disallow any claim except such claim for freight as ought reasonably to be allowed.

Cargo condemned.

Freight allowed.

Solicitor for the Procurator-General: *The Treasury Solicitor.*

Solicitors for shipowners: *Clarkson & Co.*

T. L. M.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE BANGOR.

[1915, No. 731.]

1916

May 30;
June 9.

Prize Court—Neutral Vessel—Unneutral Service—Capture in Neutral Territorial Waters—Validity—Hague Conference, 1907, Convention XIII., arts. 1 and 2.

Assuming that Convention XIII. of the Hague Conference, 1907, respecting the rights and duties of neutral Powers in maritime war, is a binding Convention, it has not modified the well-established rule of international law that neither an enemy, nor a neutral acting the part of an enemy, can claim the restitution of captured property on the sole ground that the capture took place within neutral territorial waters; it is only by the neutral State whose neutrality has been violated that the validity of the capture can be questioned.

SUIT for condemnation of a neutral vessel and her cargo on the ground that she was engaged in unneutral service.

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The *Bangor* (alias *Seattle*), a steamship of 5133 tons gross, was a Norwegian vessel owned by the Rederiaktieselskabet Bangor. In October, 1914, whilst at sea, she was sold to one R. Suhren, of Seattle, U.S.A., but she continued to fly the Norwegian flag, and, although permission to change the name of the vessel to the *Seattle* was given by the Collector of Customs at Christiania in January, 1915, the new name was not painted on her until some time after her capture.

On December 25, 1914, the *Bangor* left Copenhagen for New York with a small general cargo. From there she proceeded to Baltimore in ballast. At Baltimore a cargo of 6895 tons of coal was taken on board together with 1274 tons of bunkers. The cargo, according to the manifest, was shipped by the United Coal Company and was consigned to the Compania General de Obras Públicas, Buenos Aires. Subsequently some "electrical gear," consigned to the same company, and a quantity of preserved provisions, consigned to another Buenos Aires firm, were taken on board.

At Baltimore there also came on board three persons, Vielmetter, Maisch, and Farnow.

From Vielmetter's answers to interrogatories it appeared that, although he signed on as purser, he was in fact a super-cargo; that an agent of the German Government had arranged that he should have an opportunity of leaving in some supply ship; that, depending upon any message which he might receive by wireless, he controlled the whole cargo and its destination; and that it was intended that the coal and stores were to be delivered to any one of the German warships which might call for them by wireless. Maisch signed on as second steward, but was in fact a wireless operator, and Farnow was entered as an electrician.

On February 4, 1915, the *Bangor* left Baltimore ostensibly for Buenos Aires. Four days afterwards the cases of "electrical gear" were brought up from the hold. They proved to be wireless apparatus. The chart-room was fitted up as a wireless-room and the aerial was put up between the masts. A few days before reaching Monte Video the aerial was taken down. At Monte Video, apparently, new bills of lading were made out in respect of the same cargo, for amongst the ship's papers were found bills of lading dated March 6, 1915, whereby the cargo was expressed to be shipped by

the Compania General de Obras Públicas (the original consignees) and consigned to Corral, with the option of Valparaiso or Iquique, to a Valparaiso firm.

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According to the log, the *Bangor*, on leaving Monte Video, was bound for Corral for orders. She went through the Strait of Magellan, and on March 14, when nearing the mouth of the strait leading to the Pacific, she began to hoist the aerial again. At this time H.M.S. *Bristol* was sighted and the aerial was taken down. The *Bangor* was boarded, and while a prize crew were coming on board Farnow burnt certain papers and subsequently destroyed the records of the wireless messages which had been received, and Vielmetter threw overboard the wireless code.

After capture the *Bangor*, in charge of the prize crew, was taken to the Falkland Islands, where a writ was issued in prize on March 20, 1915, but by an order dated August 11, 1915, under s. 1, sub-s. 1, of the Prize Court Act, 1915 (5 & 6 Geo. 5, c. 57), the suit was transferred to the High Court of Justice, England.

Claims were filed on behalf of the Rederiaktieselskabet Bangor and on behalf of a Danish company, the Dampskibsselskabet Storebelt of Copenhagen, which claimed to have a beneficial interest in the *Bangor*. There was no appearance or claim in respect of the cargo.

At the hearing counsel for the claimants admitted that they could not controvert the inferences which the Procurator-General sought to draw from the evidence filed on behalf of the Crown, but they called the master of the *Bangor* to give evidence as to the exact place of capture.

1916. May 30. *Sir Frederick Smith, A.-G.*, and *C. R. Dunlop*, for the Procurator-General.

Aspinall, K.C., and *Balloch*, for the claimants.

[In the course of the arguments, which are fully stated in the judgment, counsel for the claimants referred to *Twee Gebroeders* (1) and *The Purissima Conception*. (2)]

Cur. adv. vult.

June 9. THE PRESIDENT (SIR SAMUEL EVANS). This is a flagrant case of a vessel flying the Norwegian flag, and commanded

(1) (1800) 3 C. Rob. 162; 1 Eng. P. C. 286.

(2) (1805) 6 C. Rob. 45, 47.

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by a Norwegian master, being fitted and manned from New York for the purposes of rendering services to German warships. Circumstances of aggravation of almost every kind attended her conduct and management. They are set out in the evidence to which the Attorney-General adverted. The master—one Hansen—attempted some kind of repudiation of the charges made against him. His efforts did not relieve the weight of those charges. He only added to his discredit the disgrace of giving false evidence.

It is unnecessary to make a statement of the facts; because counsel for the shipowners admitted that their vessel must suffer judgment of condemnation, unless she was immune from capture on the technical ground that she was at the time in waters alleged to be territorial waters of a neutral State.

The vessel was captured in the Strait of Magellan. According to the entry in the log the vessel was captured when she was in the middle of the strait opposite Port Tamar anchorage. This agreed with the statement of the British naval officers. The strait is admitted to be seven miles wide at that place. Strictly, therefore, the middle would not be within three miles of the land on either side.

The ship's master gave evidence that he took bearings which fixed his position much nearer the south shore than the line midway between the land on the north and south sides. His evidence is not worthy of any credence; and I cannot accept any part of it as being true. Accordingly, if it is material to establish that the capture took place within three miles, or a marine league, of either shore, the claimants have not proved to my satisfaction that it did.

The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection.

This case does not, in my view, call for any pronouncement upon that question. I am content to decide the question of law raised by the claimants upon the assumption that the capture took place within the territorial waters of the Republic of Chile. This assumption, of course, does not imply any expression of opinion as to the

character of the Strait of Magellan as between Chile and other nations. This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

In 1879 the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait. Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the strait was declared to be neutralized for ever, and free navigation was guaranteed to the flags of all nations.

I have referred to these matters in order to show that there is a right of free passage through the strait for commercial purposes. It is not inconsistent with this that, during war between any nations entitled to use them for commerce, the strait should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides.

Upon the assumption made for the purposes of this case that the *Bangor* was in fact captured within the territorial waters of a neutral, the question is whether the vessel was immune from legal capture and its consequences according to the law of nations. In other words, can the owners of the vessel, who are, ex hypothesi, to be treated as enemies, rely upon the territorial rights of a neutral State and object to the capture? Or must the objection to the validity of the capture come from the neutral State alone?

No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State, and not as to the enemy: see *The Anne* (1); *The Lilla* (2); *The Sir William Peel* (3); *The Adela*. (4) The proposition is neatly stated in *The Sir William Peel* (5) as follows: "Neither an enemy, nor a neutral acting the part of an

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(1) (1818) 3 Wheat. 435.

(3) (1866) 5 Wall. 517.

(2) (1862) 2 Sprague, 177.

(4) (1867) 6 Wall. 266.

(5) 5 Wall. 536.

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enemy, can demand the restitution of captured property on the sole ground of capture in neutral waters.”

It was contended by counsel for the shipowners that this well-established rule of international law had been modified by Convention XIII. of the Hague Conference of 1907. (1)

Assuming for the purpose of this judgment that Convention XIII. is binding, it is clear that the Convention was only directed to the relations between neutral Powers and belligerent Powers, and was only intended to apply to questions arising between neutral Powers and belligerent Powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State as between two belligerent Powers where the neutral State did not intervene.

For these reasons I decide that the objection made by the claimants to the validity of the capture, even if it took place in neutral territorial waters, is not well founded, and I disallow the claim with costs.

The judgment of the Court is that the vessel and her cargo be condemned as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor.*

Solicitors for claimants : *Botterell & Roche.*

(1) The material articles of this Convention are as follows :—

1. “Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.”

2. “Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.”

3. “When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.”

Convention XIII. was signed by Great Britain (with reservations) and by Chile, but was not ratified by either Power. It was both signed and ratified by Norway.

E. C. T.

ROBERTS *v.* ROBERTS AND LANG (THE KING'S PROCTOR
SHOWING CAUSE.)

1916
Feb. 21.

*Divorce—Poor Person—Appearance and Plea by the King's Proctor—
Costs.*

A petitioner, as a poor person, obtained a decree nisi for the dissolution of his marriage, but did not apply for leave to defend as a poor person the subsequent proceedings upon the appearance and plea of the King's Proctor, who successfully showed cause against the decree being made absolute :—

Held, that the King's Proctor was entitled to an order for costs against the petitioner.

MOTION on behalf of the King's Proctor.

William Henry Roberts petitioned by leave as a poor person and obtained in an undefended suit a decree nisi for the dissolution of his marriage.

The King's Proctor entered an appearance and filed a plea, wherein he alleged that the petitioner had committed adultery, and on this ground asked for the rescission of the decree and the dismissal of the petition.

The petitioner's solicitor thereupon wrote to the King's Proctor to the effect that the petitioner would not contest the plea.

D. Cotes Preedy, for the King's Proctor, moved that the decree nisi be rescinded, the petition dismissed, and the petitioner condemned in the King's Proctor's costs.

Comyns Carr, for the petitioner, on the question of costs only, contended that as he had been admitted to petition as a poor person, the effect of Order XVI., r. 29 (1), was that only in very exceptional

(1) Order XVI., r. 29, is as follows :—"When a person is applying or is admitted to take or defend or be a party to any legal proceedings as a poor person, he shall not be liable for any Court fees or fees on taxation of costs nor unless the Court or a judge shall otherwise order to pay costs to any other party, except as provided by the Rules of this Order; and no person shall take or agree to take or seek to obtain any fee, profit or reward, either for inquiry or report or for the conduct of the proceedings; and any person so doing shall be guilty of a contempt of court. If any such fee, profit or reward shall be given or promised, the applica-

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circumstances and by special order of the Court ought an order for costs to be made against him.

BARGRAVE DEANE J. There is no order here that in the intervention the petitioner should appear as a poor person. He did not disclose to the Court, upon the hearing of his petition, that he had committed adultery, and he thus obtained a decree contrary to the justice of the case. I order him to pay the costs of the King's Proctor. The decree is rescinded and the petition dismissed.

Solicitors : *The King's Proctor ; W. M. Pyke.*

H. D. G.

1916

May 9, 15,
16.

GREENE v. GREENE.

Restitution of Conjugal Rights—No Matrimonial Offence by Petitioner—Discretion of Court to refuse Relief—Test of Discretion, Impossibility of Cohabitation.

The Court has discretion to refuse relief to a petitioner seeking a decree of restitution of conjugal rights, even in the absence of a matrimonial offence on the part of the petitioner.

The question for decision is whether the respondent had reasonable cause for leaving the petitioner, and the test is whether it has become practically impossible for the spouses to live together. A wife may develop habits of intemperance and may exhibit jealousy of her husband and frivolity of conduct, and these facts may constitute no reasonable grounds for the husband deserting his wife.

Beer v. Beer (1906) 54 W. R. 564 distinguished.

WIFE's petition for restitution of conjugal rights.

The husband by his answer admitted refusal to live with the petitioner, but claimed to have reasonable grounds for his refusal. By paragraphs 4 and 5 of his answer it was alleged as follows :—

“ The petitioner has for the greater part of the married life, and

tion or admission, as the case may be, may be dismissed or struck out, in which case the poor person shall not afterwards be admitted as a party to the same cause or proceeding as a poor person unless otherwise ordered. Provided that nothing contained in this rule shall

preclude any solicitor from receiving either from the poor person or out of any fund which may from time to time be approved by the Lord Chancellor the payment of the out-of-pocket expenses of any solicitor.”

more particularly in and since the year 1909, been addicted to alcoholic excess, insulted guests, dismissed servants without just or reasonable cause; on one occasion was brought home intoxicated by the wife of a tradesman in the neighbourhood; repeatedly threatened to commit suicide and told the respondent that he would be accused of murdering her; said that he had taken a haunted house and wanted to get her there to murder her; was insanely jealous of any animal or human being that the respondent paid the slightest attention to; and, by her conduct towards the respondent, imposed such prolonged strain, mental and physical, upon him, that his health suffered and married life was rendered impossible.

“That the petitioner has carried on clandestine correspondence with more than one man, and that more particularly she was in clandestine correspondence with a foreigner, named or passing by the name of Armand Lorand, before and after the date of her present petition, and more particularly in the months of May and June, 1915, and was frequently meeting the said Armand Lorand.”

The petitioner, in her reply, traversed the allegations in the answer.

The burden of proof being upon the husband, his case was opened to the Court, and evidence was tendered bearing out the allegations of the answer.

At the conclusion of the husband's case,

Hawke, K.C., and *Clifford Mortimer (C. J. Willock* with them), for the petitioner, submitted that there was no case for the petitioner to answer. No doubt *Russell v. Russell* (1) and *Oldroyd v. Oldroyd* (2) gave the Court a discretion, but the behaviour of the petitioner in the present case is not such as to entitle the respondent to desert her. The only case approaching the present is *Beer v. Beer*. (3) In that case the petitioner was a habitual drunkard and was held to be within that definition as given in the Habitual Drunkards Act, 1879.

Rose Innes, K.C., and *Durley Grazebrook*, for the respondent, referred to the dictum of Lord Herschell in *Mackenzie v.*

(1) [1895] P. 315.

(2) [1896] P. 175.

(3) 54 W. R. 564.

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Mackenzie (1), which was adopted by the Court in *Oldroyd v. Oldroyd*. (2)

SHEARMAN J. In this case the wife sues for restitution of conjugal rights. By the husband's pleading it is not denied that he separated himself from the petitioner, but it is alleged that he had reasonable cause for so doing. The burden of proving the allegations of reasonable cause rested entirely on the husband. The only reported case of the same kind is *Beer v. Beer*. (3) The husband called evidence in support of his case, and a great deal of correspondence was put in which shows exactly what was happening before the suit was brought. At the conclusion of the husband's case the objection was taken that, even if the evidence was accepted, it was not sufficient to resist the claim for relief. I have to apply such principles as I can deduce from the cases. Prior to the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), there was, according to the former ecclesiastical law, no answer to a suit for restitution of conjugal rights unless the respondent could show that the petitioner had committed a matrimonial offence entitling the respondent to a decree of judicial separation at least. After the Act of 1884 had been passed it was laid down by the Court of Appeal in the celebrated case of *Russell v. Russell* (4) that the Court had a discretion to refuse relief if the wife had behaved in such a way as would, even in the absence of a matrimonial offence, afford the husband reasonable excuse for leaving her. Now what is reasonable cause? The test as laid down in *Oldroyd v. Oldroyd* (2) is this: Is it practically impossible for the spouses to live properly together? No doubt there are many cases where a separation is in the interest of both parties and a joint household is against the interests of both parties; but there is only one case reported in any way resembling the present, *Beer v. Beer* (3), and that is distinguishable. I do not want to deal with the evidence at length. The petitioner was hysterical and jealous. She made false accusations against her husband and wrote affectionate letters to other men; she has written letters which no modest or sensible woman would have written; but it is not suggested that there was any guilty intimacy

(1) [1895] A. C. 384.

(3) 54 W. R. 564.

(2) [1896] P. 175.

(4) [1895] P. 315.

between her and the recipients, and I cannot hold that these letters entitle the husband to desert the wife. She was furiously jealous of her husband, with the not unnatural result of her outbursts that after a time he separated himself from her more and more. She became lonely in consequence, with the result that, if the husband's evidence be accepted, she gradually gave way to drink. Then we find the usual concomitants—untrue accusations and hysterical outbursts. I do not think that I ought to lay down any new law. I cannot, in exercising the discretion that *Russell v. Russell* (1) and *Oldroyd v. Oldroyd* (2) say that I have, lay down the proposition that if a wife gives way to intemperance, with its usual consequences, the husband is entitled to desert her. It is due to him to say that there is no evidence that he behaved badly to his wife, but her conduct was not such as to entitle him in law to say "I will not live with you." I am bound to hold that the husband has shown no reasonable grounds for deserting his wife, and that there is no case for her to answer. The prayer of her petition must therefore be granted.

I make the usual order for restitution of conjugal rights, to be obeyed within fourteen days after service, with costs.

Solicitors for petitioner: *Ellis, Munday & Clarke.*

Solicitors for respondent: *Cox & Lafone.*

(1) [1895] P. 315.

(2) [1896] P. 175.

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Shearman J.

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March 20 ;
 May 15 ;
 July 3.

IN THE ESTATE OF ADA STANLEY.

Probate—Unattested Paper—Will of Soldier—Wills Act, 1837 (1 Vict. c. 26), s. 11—Paper written by Female Nurse on Leave after receiving Orders to rejoin—Executor according to the Tenor.

A nurse, employed under contract by the War Office on hospital-ships, wrote a letter giving the addressee full liberty to deal with her affairs and giving directions as to the disposal of her property. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark :—

Held, that the letter, which was unattested, was privileged as a soldier's will within the meaning of the Wills Act, 1837, s. 11, and that the person to whom it was addressed was executor according to tenor, and, as such, entitled to probate of the document.

MOTION FOR PROBATE.

The deceased, Ada Stanley, died at Netley Hospital on December 23, 1915. Previously to the war she had been a member of the Territorial Force Nursing Service, and in January, 1915, she was mobilized for duty. She was subsequently seconded for service under the Queen Alexandra Imperial Military Nursing Service, and proceeded abroad in July, 1915. Having been employed upon a hospital-ship, she returned to England on October 1, 1915, and was on leave pending further orders.

On October 5, 1915, she received orders to re-embark for duty. On October 8, 1915, she wrote to her niece, the present applicant, in the terms following :—

“ Oct. 8, 1915. Hotel York, London.

“ My dear Ada (neice [*sic*]),—I give you full liberty to deal with my affairs. Give Miss Horrocks 10*l.* and anything of mine she cares to have for a keepsake.

“ 250*l.* that is invested with Mr. Clark and my P. Office money for yourself minus the 10*l.* for Miss H. and 5*l.* each for Dorothy and Nellie and Kathleen, and Mr. Clark whatever you care to give him as a little remembrance from me and Mrs. Clark something of my personal belongings also Mrs. Whittaker my housekeeper.

“ 50*l.* invested in Mill for Mary Iredale ; you will find the address &c. in my box.

“ My insurance money for my sister Emma (Fairbairn) to be used just for her own personal comfort, not otherwise. Policy in my trunk Kershaw St. Divide as you think my belongings but please make no fuss.

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“ With love, yours Ada.

“ P.S.—I have no bills to pay.”

On October 5, 1915, orders to embark were despatched by post from the War Office, and the deceased journeyed to Southampton. On October 9 orders were sent to the embarkation officer at that port to embark the deceased. On October 10, 1915, the deceased embarked upon the hospital-ship *Egypt*, and returned in the hospital-ship *Mauretania* in December, 1915, and on December 23, 1915, she died in Netley Hospital of dysentery contracted whilst on active service. The next of kin and parties interested in distribution were brothers and sisters and two children of a deceased brother, and they with one or two exceptions consented to the matter being dealt with on motion. The value of the personal estate was stated to be about 550*l*.

The applicant, Ada Louise Stanley, niece of the deceased, claimed to be executrix according to tenor, and asked that the letter in question should be admitted to probate.

By the terms of her engagement, which was with the War Office, the deceased had agreed to serve for twelve calendar months from the date of entering on duty, or until her services should be no longer required, whichever should first happen.

The motion was twice adjourned for fuller information as to conditions and dates of service of the deceased, and of orders for embarkation in October, 1915.

W. O. Willis, for the applicant. The nearest authority in point is *In the Goods of Hale* (1), where it was held that a female typist on board a liner was a seaman within the meaning of s. 11. On similar principles the deceased in the present case may be held to be a soldier.

J. Harvey Murphy, for the next of kin and parties interested in case of intestacy. To obtain the privilege of the section the deceased, if considered as a soldier, must have been in expedition;

(1) [1915] 2 I. R. 362.

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and it is submitted that the case of *In the Goods of Hiscock* (1) went too far.

July 3. BARGRAVE DEANE J. I think that a nurse is entitled to make a privileged will upon the same footing as a soldier or a sailor, following the principle of the Irish case cited. (2) Probate will go of the letter as constituting a soldier's will, the contract of the deceased having been with the War Office, and the grant will be made to the applicant as executrix according to tenor. The costs of both parties will be paid out of the estate, and, by consent, as between solicitor and client.

Solicitors for applicant: *H. G. Campion & Co., for Clegg & Sons, Sheffield.*

Solicitors for other parties: *Neave, Morton & Co., for Smailes, Huddersfield.*

(1) [1901] P. 78.

(2) [1915] 2 I. R. 362.

H. D. G.

HIGH COURT OF JUSTICE.

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PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Feb. 8, 22.

ADMIRALTY.

(IN PRIZE.)

THE CORSICAN PRINCE.

[1915, No. 349.]

Prize Court—Seizure of Cargo—Release of Proceeds—Claim for Freight—Jurisdiction.

When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents, with the result that its jurisdiction will be exclusive as to the allowance of freight, damages, expenses, and costs in all cases of seizure and capture, although there may have been a voluntary release of the cargo, or its proceeds, before the incidental question arose.

SUMMONS, issued by the owners of the steamship *Corsican Prince* (and adjourned into Court for argument), in effect asking for directions for the assessment of the amount of freight and other moneys claimed by the shipowners, and for payment of the amount so assessed out of the proceeds of the cargo in Court.

The British steamship *Corsican Prince*, owned by the Prince Line, Limited, loaded at Odessa 250,000 poods of barley consigned to Hamburg. The loading was completed after the declaration of war between Russia and Germany. The vessel was allowed by the Russian authorities to proceed on the master undertaking to call at named British ports. On arrival at Falmouth the vessel was ordered by the Marshal to Liverpool, where, on October 29, her cargo was seized, and, to prevent its deterioration, sold, the proceeds being paid into Court. A writ was subsequently issued by the Procurator-General claiming condemnation, and appearances were entered by the Russian Bank for Foreign Trade, and by the Société Générale de Paris, as owners of parts of the cargo, and by the Prince Line, Limited, as owners of the vessel and claimants for freight, demurrage, and charges. By consent orders were made (the terms of which are

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set out in the judgment) for the payment out to the Russian Bank for Foreign Trade, and to the Société Générale of the net proceeds of the sale of their portions of the cargo, subject to any rights as to freight which the shipowners might have.

The Russian Bank for Foreign Trade then issued a writ in the King's Bench Division against the shipowners with a view to transfer the proceedings to the Commercial Court, and the question now before the Prize Court was whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds, were to be determined in a common law Court in the King's Bench Division or in the Prize Court.

1915. Feb. 8. *Maurice Hill, K.C., and Balloch*, for the shipowners, the Prince Line, Limited. The arguments of counsel are dealt with at length in the judgment; but, shortly stated, it was submitted, on behalf of the shipowners, that the decision of the incidental questions arising in this case between the shipowners and cargo owners, as to freight, &c., was for the Prize Court, to be determined according to the principles of prize law, such questions not being cognizable by a common law Court applying municipal law; that is to say, when once the Prize Court had acquired jurisdiction over the principal matter, it was entitled to exert its authority over all the incidents, so that it had exclusive jurisdiction as to the allowance of freight, damages, expenses, and costs in all cases of seizures and captures, whether the proceeds of the cargo were released or not. See Story's Principles and Practice of Prize Courts (1854), pp. 30, 31; see also *Le Caux v. Eden* (1), where an exhaustive examination took place as to the exclusive jurisdiction of the Prize Court in respect of such matters as were now under consideration, and as to the incompetence of a common law Court, applying municipal law, to deal with the subject-matter. This case was followed by *Faith v. Pearson* (2), which (as pointed out in the judgment of the President) carried the doctrine of exclusive jurisdiction still further.

In support of the contention raised on behalf of the shipowners, and in addition to the cases cited in the judgment, the following

(1) (1781) 2 Doug. 594.

(2) (1815) 4 Camp. 357.

cases, statutes, orders, and rules were referred to:—*Smart v. Wolff* (1); *The Nassau* (2); *The Copenhagen* (3); *The Diana* (4); *The Hoffnung* (5); *The Friends* (6); *The Racehorse* (7); *The Martha* (8); *The Isabella Jacobina* (9); *The Anna Christiana* (10); *The Antonia Johanna* (11); *The Fortuna* (12); the Prize Court Rules, 1914, Order xxvii., r. 3 (5.), Order xlv.; the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 3; the Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 4; the Prize Courts Act, 1894 (57 & 58 Vict. c. 39); Order in Council, August 5, 1914 (see Manual of Emergency Legislation, 1914, p. 256).

Aspinall, K.C., and *R. A. Wright*, for the Russian Bank for Foreign Trade. The main proposition as to the jurisdiction of the Prize Court put forward by counsel for the shipowners is not disputed, nor is the correctness of the common law cases relied on, such as *Smart v. Wolff* (1) and *Faith v. Pearson* (13), denied; but it is submitted that the conclusion drawn by counsel goes too far, for it amounts to this: once given a capture, then any dispute ancillary thereto is within the exclusive jurisdiction of the Prize Court. Cases, however, like the present lie outside the authorities referred to, for, after the voluntary release, the Court ceased to have any jurisdiction, and the question of freight would, therefore, properly come before a Court of common law. This view is supported by such American authorities as *Hudson v. Guestier* (14), and the expression there used "voluntary discharge" of the captured vessel is approved by Story J.: see appendix to Wheaton's Reports, vol. 2, p. 2; and Upton's Law of Nations, 2nd ed. (1863), p. 389. [Reference was also made to *The Two Friends* (15) and *Luke v. Lyde*. (16)]

Darby, for the Société Générale de Paris, agents for the Inter-

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| (1) (1789) 3 T. R. 323. | <i>horse</i> , pp. 106 107. |
| (2) (1866) 4 Wall. 634. | (9) (1801) 4 C. Rob. 77. |
| (3) (1799) 1 C. Rob. 289. | (10) (1778) Hay & Marriott, |
| (4) (1803) 5 C. Rob. 59. | 161. |
| (5) (1805) 6 C. Rob. 231. | (11) (1816) 1 Wheat. 159. |
| (6) (1810) Edw. 246; 2 Eng. | (12) (1802) 4 C. Rob. 278. |
| P. C. 48. | (13) 4 Camp. 357. |
| (7) (1800) 3 C. Rob. 101. | (14) (1808) 4 Cranch, 293. |
| (8) (1801) Note to <i>The Race-</i> | (15) (1799) 1 C. Rob. 271. |
| (16) (1759) 2 Burr. 883. | |

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national Bank of Commerce, Petrograd, adopted the arguments of counsel for the shipowners.

Case, for the Procurator-General.

Cur. adv. vult.

Feb. 22. THE PRESIDENT (SIR SAMUEL EVANS). This is a summons which came before me in chambers, and which I adjourned into Court for argument.

It is a summons issued by the Prince Line, Limited, the owners of a British vessel, the steamship *Corsican Prince*, in effect asking for directions for the assessment of the amount of freight and other moneys claimed by the shipowners, and for payment of the amount so assessed out of the proceeds of the cargo now in Court in these prize proceedings. Part of the cargo was claimed by the Russian Bank for Foreign Trade (hereinafter referred to as "the Russian Bank"), and a consent order was made for payment out to the bank of part of the proceeds of the sale of the cargo upon the terms, and in the circumstances, which will be referred to later. A caveat against payment out without notice was afterwards entered on behalf of the shipowners in accordance with the Prize Court Rules. Later, a writ was issued in the King's Bench Division by the Russian Bank against the shipowners, in which a declaration as to the rights of the parties was claimed; and a summons to stay that action was issued, which stands adjourned.

The matter which now arises for decision is whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds, are to be determined in a common law Court in the King's Bench Division, or in the prize proceedings in this Division. I apprehend that the principles and practice governing this matter are the same since the assignment to this Division of the Prize Court jurisdiction of the High Court under the Judicature Act, 1891, as in former times when the jurisdiction in prize was vested in and exercised by the High Court of Admiralty. The subject is one of general importance affecting our judicature, and I propose in the first place to deal with it upon lines applicable to proceedings of this nature generally, and then to state the particular facts of this case to which the principles and practice governing such cases have to be applied.

Counsel for the shipowners cited many authorities to show that this Court, exercising its prize jurisdiction, has the exclusive right to determine such questions as those in issue, and not a common law Court, and that such determination should be in accordance with the prize law, and not with the common or municipal law.

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It has been my duty to examine those authorities, and others dealing with or throwing light upon the subject. Having done this, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shows that the results which are summarized in text-books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases. Story J., who, as an exponent in treatises and judgments of matters relating to prize law, is hardly second to Lord Stowell himself, in his *Notes on the "Principles and Practice of Prize Courts"* writes as follows (1854, pp. 30—32): "When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; It may also enforce its decrees against persons having the proceeds of prizes in their hands notwithstanding no stipulation, or an insufficient stipulation has been taken on a delivery on bail; for it may always proceed in rem where the res can be found, and is not confined to the remedy on the stipulation; and in these cases the Court may proceed upon its own authority ex officio, as well as upon the application of parties; nor is the Court functus officio after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter. The Prize Court has also exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures, and though a mere maritime tort unconnected with capture jure belli may be cognisable by a Court of common law; yet it is clearly established that all captures jure belli, and all torts connected therewith, are exclusively cognisable in the Prize Court." And in a decision of the Supreme Court of the United States in which Story J. delivered judgment he says: "For if the Admiralty has, as it is conceded on all sides it has, jurisdiction over the incidents, as well as the principal matter

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of prize, it must be just as much exclusive in the first case, as in the last": *Maisonnaire v. Keating*. (1)

So Chancellor Kent, in his Commentaries on American Law, says: "It is a principle perfectly well settled, and constantly conceded, and applied, that Prize Courts have exclusive jurisdiction, and an enlarged discretion, as to the allowance of freight, damages, expenses, and costs, in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*": vol. 1, p. 360, 12th ed., by Mr. Justice O. W. Holmes.

This passage was cited with approval by the Supreme Court in *The Siren*. (2) One more passage may be cited from Halleck's work on International Law (4th ed., vol. 2, pp. 433, 434): "Prize Courts also have exclusive jurisdiction, and an enlarged discretion, as to allowance of freight, damages, expenses, and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli* This rule rests upon the ground that where the Prize Court has the sole and exclusive jurisdiction of the original matter, it ought also to have such jurisdiction of all its consequences and of everything necessarily incidental thereto. The Courts of common law in England have no jurisdiction at all of such incidental questions; and this doctrine has been reaffirmed by the Courts of the United States."

In the leading case of *Le Caux v. Eden* (3) Buller J., in a judgment which deals exhaustively with the subject, says: "The principle is, that the question prize or not prize, and the consequences of it, are conusable solely in the Admiralty Court; the true reason of which is, that prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country."

Lord Mansfield, who was a party to the decision in *Le Caux v. Eden* (3), in the history he gave of the instance and prize jurisdictions of the Court of Admiralty in *Lindo v. Rodney* (4), said: "The whole system of litigation and jurisprudence in the Prize Court, is

(1) (1815) 2 Gallison, 325, 343.

(2) (1868) 7 Wall. 152, 161.

(3) 2 Doug. 594, 609.

(4) (1781) 2 Doug. 614.

peculiar to itself ; it is no more like the Court of Admiralty, than it is to any Court in Westminster Hall.” And after describing some of the matters with which the Prize Court had to deal, he added : “ These views cannot be answered in any Court of Westminster Hall, and, therefore, the Courts of Westminster Hall never have attempted to take cognisance of the question ‘ prize or not prize ’ ; not from the locality of being done at sea, but from their incompetence to embrace the whole of the subject.”

The decision in *Le Caux v. Eden* (1) was that an action for false imprisonment would not lie at common law where the imprisonment was in consequence of taking the ship as prize, although the ship had been acquitted and restored, and the captor had been condemned in costs and damages in the Prize Court. More than thirty years afterwards came the case of *Faith v. Pearson* (2), which carried the doctrine of the exclusive jurisdiction of the Prize Court still further ; because in that case (which was an action at common law for trespass for seizing ship and cargo) the captor, who found he had made a mistake in capturing the ship, had given her up without having instituted any proceedings against her in the Court of Admiralty. In deciding that the common law Court had no jurisdiction, Gibbs C.J. said (3) : “ The moment it appears that the ship was seized as an enemy, there is an end of this action. Although the defendant had no probable cause for what he did, he is only amenable in the Court of Admiralty. I well remember the case of *Le Caux v. Eden* (1) being decided. The decision was approved of at the time, and has been adhered to ever since. The principle there laid down fully applies to the action we are now trying. If the ship is actually seized as prize, although she is released by the captor without being libelled in the Admiralty Court, the Courts of common law have no jurisdiction upon the subject. . . . We are incompetent here to consider whether the captor was excusable for what he did ; and if he was not, what compensation he ought to make to the parties injured. I conceive that they are by no means without remedy, and that proceedings may be originated in the Admiralty Court on the part of the captured. There the question of prize or not prize will be properly discussed, the existence of

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(1) 2 Doug. 594.

(2) 4 Camp. 357.

(3) 4 Camp. 358, 359.

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probable cause will be proved or negatived, and by a single decree justice will be done to all concerned."

The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo ; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released ; and, apparently, no actions involving those questions in similar cases were brought in any common law Court, and this is obviously for grounds solid in justice and convenient in practice ; because the two Courts administer two different codes or systems of law ; the Prize Courts deal with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-performance or non-completion of the contract of affreightment ; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing according to whether the contract of affreightment had been performed or not ; but the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole, or a moiety, of the freight, or a sum pro rata itineris, or it may discard the contract rate altogether, even as a basis for assessment or calculation (see *The Twilling Riget* (1)) ; or it may withhold or diminish the sum by reason of misconduct, as, e.g., by resistance to search, or spoliation, or non-disclosure of papers.

And we find that in accordance with the principles, precedents, and practice which have established the exclusive jurisdiction of the old High Court of Admiralty, to which the Admiralty Division of this Court has succeeded when sitting as a Prize Court, the Prize Court Rules have been framed for this Court ; and have been made by the Privy Council under the Prize Courts Act, 1894, and not by the Rule Committee which frames the rules for the High Court. It is not necessary to refer further to these rules ; but attention may be directed to Order XLV., which provides that, in the absence

(1) (1804) 5 C. Rob. 82.

of prescribed rules, the practice of the late High Court of Admiralty in prize proceedings shall be followed, or such other practice as the President of this Division may direct.

It may also be noted that the appeal from decisions of this Court on all questions, claims for freight included, is to the Judicial Committee of the Privy Council, whereas if similar questions could be tried in the Commercial Court or any Court of the King's Bench Division the appeal would be to the Court of Appeal and to the House of Lords.

This Court has also its special officers, like the Registrar and Merchants, and the Admiralty Marshal, and its special machinery for dealing with all such matters as may arise in prize proceedings.

I have dealt with the important question of jurisdiction generally ; but, in truth, counsel for the claimants, the Russian Bank, did not dispute the main propositions which have been stated, but contended, as I understood, that where, as in this case, the captors, or the Crown after seizure, released the goods, not only had the King's Bench Courts jurisdiction to deal with the claim for freight, but that they alone had the jurisdiction to the exclusion of this Court, even when the proceeds of the cargo seized and sold are now in the hands of this Court. This contention is, in my view, quite unsound. A somewhat similar argument was put forward in *Le Caux v. Eden* (1) on the ground that the ship had been declared by the sentence of the Prize Court to be no prize ; but it did not prevail. As I have before pointed out, the Prize Court exercised jurisdiction, and exclusive jurisdiction, where the subject-matter had been acquitted or released, and it has been held that such jurisdiction was vested in it, even when captures had been abandoned without any proceedings having been instituted at all.

When the particular facts of the present case are looked at it is quite clear that this Court alone has jurisdiction to deal with the claim for freight, and that it would be most inconvenient if it were otherwise. The essential facts very shortly stated are as follows : The ship's cargo consisted altogether of 250,000 poods of barley. It was loaded at Odessa, the loading being completed after war was declared between Russia and Germany. It was all consigned to Hamburg. The Russian authorities raised difficulties about the

(1) 2 Doug. 594.

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ship leaving, but afterwards allowed her to sail on an undertaking by the master to call at Malta, Gibraltar, and Falmouth. She arrived at Falmouth and was ordered by the Marshal of this Court to Liverpool. She was detained, and afterwards, on October 29, her cargo was seized. Upon the application of the Marshal an order was made by this Court for the sale of the cargo to prevent its deterioration, and for the payment of the proceeds into Court.

A writ was in due course issued by the Procurator-General claiming the condemnation of the cargo or its proceeds as prize. The whole cargo was sold for about 29,800*l*. The net proceeds amount to about 28,600*l*., and are now in Court. Appearances were entered in these proceedings by the Russian Bank claiming as owners of part of the cargo, namely, 51,500 poods ; by the Société Générale, claimants as to other parts, namely, 46,280 poods ; and by the Prince Line, Limited, as owners of the vessel. So far as I have been informed, no claims have been made in respect of the rest of the cargo, over 150,000 poods, or its proceeds. After the sale of the cargo an order was made with the consent of the Procurator-General and of the claimants in these terms : “ Upon consent of H.M. Procurator-General, it is ordered that he do pay out to the Russian Bank for Foreign Trade the net proceeds of sale of 51,500 poods of barley ex the above vessel upon production of the copy bills of lading, payment of any charges which may have been incurred in connection with the detention thereof, and subject to any rights as to freight which the shipowners may have had over the goods at the date of the seizure thereof.” A similar order was made in favour of the Société Générale in respect of 46,280 poods. The Prince Line, Limited, as claimants for freight, demurrage, and charges, entered a caveat against the payment out of Court of any of the proceeds without notice to them. After all these steps were taken in these proceedings the Russian Bank issued their writ in the King’s Bench Division. The summons to transfer the trial of the action to the Commercial Court is stayed pending this decision. The Société Générale, through their counsel, adopted the argument of counsel for the shipowners, and they desire that the questions affecting them should be heard in this Court. Upon these facts I repeat that it is clear beyond dispute that the questions to be

decided between the shipowners and cargo owners are within the exclusive jurisdiction of this Court.

I will only point out further that the Crown has full right to consent to the release of any ship or goods captured or seized on any grounds that to the Crown may seem fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown's droits of admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to any one interested in these proceedings at any stage to allege and to set out to prove that the seizure of the cargo was lawful.

I give directions therefore that the claim of the shipowners, and all questions between them and the Russian Bank, and the Société Générale, be heard in these prize proceedings.

The costs of these interlocutory proceedings to be paid by the Russian Bank for Foreign Trade.

Solicitor for the Procurator-General on behalf of the Crown :
The Treasury Solicitor.

Solicitors for shipowners : *King, Wigg & Brightman, for Wilkinson & Marshall, Newcastle.*

Solicitors for Russian Bank for Foreign Trade : *Coward & Hawksley, Sons & Chance.*

Solicitors for Société Générale de Paris : *Loughborough, Gedge, Nisbet & Drew.*

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June 3, 7.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE IOLO.

[1915, No. 110.]

Prize Court—Outbreak of War—Voyage of British Ship diverted—Seizure and Sale of Cargo—Proceeds released subject to Freight and Charges—Reference—Jurisdiction of Common Law Court and Prize Court.

Shortly before the outbreak of war a British ship left a Russian port in the Black Sea with a grain cargo for Hamburg, and on the declaration of war between Great Britain and Germany her owners, at the suggestion of the British Admiralty, diverted the vessel to a British port where the cargo was seized by the Customs authorities, and subsequently sold by the Marshal, the proceeds being paid into Court. The Russian Bank for Foreign Trade, as owners, claimed the proceeds of part of the cargo, namely, two parcels of barley, and the amount was paid out to them subject to a claim by the ship-owners for freight and charges:—

Held by the President (Sir Samuel Evans), that, though at common law no freight was due as the contract of affreightment had not been carried out, and had become illegal by reason of the war, the Prize Court, acting on equitable principles (see *The Juno*, ante, p. 169), would allow such a fair and reasonable sum in respect of freight and charges as should be ascertained by a reference.

SUMMONS adjourned into Court for argument on the question whether the claimant, the Russian Bank for Foreign Trade, was entitled to the whole of the proceeds of the sale of certain parcels of barley, originally seized as prize, without any deduction in respect of freight or charges claimed by the shipowners.

The following statement of facts is taken from the judgment of the President:—

“The steamship *Iolo* is a British vessel. She started before the war from the port of Nicolaieff upon a voyage to Hamburg laden with various goods destined for Hamburg and for German consignees,

Part of the cargo consisted of two parcels of barley, one of 30,280 poods, and the other of 156,580 poods (making a total of 186,860 poods), which, or the proceeds of sale of which, were claimed in these proceedings by the said bank, hereinafter called 'the Russian Bank.' This bank was incorporated under the laws of the Empire of Russia with its head office at Petrograd, and with branches elsewhere in the said Empire, and in other European countries, including England, but not Germany or Austria.

"While the ship was on her voyage war was declared.

"The shipowners apprised the British Admiralty of her movements, and asked for instructions. The Admiralty advised that the ship should proceed to Falmouth. This was communicated to the ship as she was passing Gibraltar; but before she reached the Lizard she was directed to proceed to Barry Dock, and arrived there on August 19, 1914. On her arrival there, her cargo was seized as prize by the Customs authorities acting for the Procurator-General of the Crown. On August 31 the writ in these prize proceedings was issued against the owners of the goods laden on the vessel, including the portion subsequently claimed by the Russian Bank. On September 2, by the order of this Court, the Marshal was authorized to sell the cargo; and it was sold accordingly, and the proceeds of sale were paid into Court in these proceedings. On September 4 an appearance was entered on behalf of the Russian Bank claiming as owners of the 186,860 poods. The ship was directed by the Marshal to proceed from Barry to Portishead to discharge the cargo for delivery to the purchasers. On October 7 the shipowners entered a caveat against the payment out of the proceeds of the sale without notice to them. The object of entering the caveat was to secure payment of the freight and other charges claimed by the shipowners.

"Shortly after the seizure the Marshal had given the shipowners an undertaking in the following terms:—'I undertake to pay you, on the completion of the discharge of the cargo, the amount of the ascertained freight and charges on the outturn in the terms of the charterparty and bills of lading.' In accordance with this the Marshal has already paid the shipowners 1750*l.* on account. Later the shipowners delivered particulars of their claim in respect of the whole cargo, which summarized was as follows:—(1.) Freight as per

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charterparty, 2118*l.* 6*s.* 9*d.*; (2.) charges at Barry, 119*l.* 14*s.* 4*d.*; and (3.) claim for detention or loss of time, 1080*l.* Roughly speaking, rather more than half of this claim, if allowed, would fall upon the portion of the cargo claimed by the Russian Bank. After entering appearance in these proceedings the bank instituted an action in the King's Bench Division of the High Court asking for a declaration as to their rights. This action was subsequently abandoned.

“Certain communications passed between the Russian Bank and the Procurator-General, the result of which was that the Procurator-General consented to release to the bank the net proceeds of part of the cargo to which they laid claim, upon the bank giving an indemnity in writing on or about November 19.

“The document evidencing this arrangement was in the following terms:—‘In Prize. S.S. *Iolo*. Whereas the undermentioned goods have been seized as prize: And whereas the Russian Bank for Foreign Trade claims to be entitled to the goods hereinafter described and has requested the Procurator-General to consent to an order for the release to them of the said goods: And whereas the Procurator-General is willing upon receiving the following indemnity (and subject to such other conditions (if any) as may have been arranged between the parties) to consent to such an order: Now in consideration of the Procurator-General agreeing to give such consent the said Russian Bank for Foreign Trade undertakes to indemnify the Procurator-General whether on his own behalf or on behalf of the Crown or on behalf of the Admiralty Marshal or of any officer or official of the Crown or of the Prize Court or of any person acting under the authority or instructions of the same or of any one or more of them against all petitions (including petitions of right) claims proceedings actions or demands for or in respect or on account of the goods or any part thereof or any proceeds thereof or arising directly or indirectly out of or connected with the seizure detention or release of the goods or any part thereof and against all costs damages and expenses in respect of the premises. And the bank hereby undertakes to refund to the Procurator-General any sum or sums of money which may hereafter be found to have been paid or may be paid for the said parcels or any of them by an alien enemy.’

“ Then followed a description of the goods by reference to the numbers of the bills of lading, and the numbers of the poods, amounting in all to 156,580 poods. 1915
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“ It may be assumed that a similar indemnity was given in respect of the 30,280 poods ; or at any rate that the same conditions applied to the release of the proceeds of this parcel. Later in the proceedings, by consent of the Procurator-General, orders were made authorizing the Marshal to pay out to the solicitors for the Russian Bank the net proceeds of sale of the 30,280 and 156,580 poods of barley less certain sums which were retained until the question of freight and expenses was decided. Pursuant to such orders two sums of 2500*l.* and 11,000*l.* (making 13,500*l.*) were paid out to the Russian Bank out of the proceeds of the sale of the cargo, leaving in Court a sum of about 1500*l.* (the balance of the proceeds) until the questions now in dispute were determined.”

R. A. Wright, for the claimant, the Russian Bank for Foreign Trade. The goods in question were released in accordance with the decision in *The Miramichi* (1), and the proceeds are not subject to deduction for freight or other charges as the shipowners failed to fulfil their contract to deliver the goods at Hamburg in accordance with the bill of lading : *Metcalf v. Britannia Ironworks Co.* (2) The contract of affreightment also came to an end by reason of illegality, as the goods could not be carried to their German destination : *St. Enoch Shipping Co. v. Phosphate Mining Co.* (3) See also *The Teutonia* (4) and Carver's Carriage by Sea, 3rd ed. (1900), s. 238 (quoting Abbott on Shipping, 13th ed. (1892), p. 754) ; *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (5) ; *Esposito v. Bowden* (6).

Adair Roche, K.C., and *W. N. Raeburn*, for the Iolo Morganwg Steamship Company, Limited, the claimant shipowners. The equitable principles adopted in the Prize Court governing a question of this nature differ from those applied at common law : see *The Juno* (7) and *The Corsican Prince*. (8) There was also an alternative,

(1) [1915] P. 71.

(2) (1877) 2 Q. B. D. 423.

(3) [1915] W. N. 197.

(4) (1872) L. R. 4 P. C. 171.

(5) [1915] 2 K. B. 379.

(6) (1857) 7 E. & B. 763.

(7) Ante, p. 169.

(8) Ante, p. 195.

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as the master could, under the terms of the bill of lading, in the event of "war disturbances," unload at the nearest safe port, which in this case would, in the circumstances, be Barry : see *Waugh v. Morris* (1) and *Sanday & Co. v. British and Foreign Marine Insurance Co.* (2)

Stranger, for the Procurator-General on behalf of the Crown.

Cur. adv. vult.

JUNE 7. THE PRESIDENT (SIR SAMUEL EVANS). [After stating the facts already set out, the learned judge continued :] On these facts, counsel for the Russian Bank contended that they were entitled to be paid out of the balance of the proceeds of the sale of the barley in full, without any deduction for freight or any other charges. The foundation of his contention was that in law the contract between the shipowners and the bank, as owners of cargo, had come to an end, because the goods were not delivered in the port of Hamburg in accordance with the contract contained in the bill of lading, and that the shipowners were not legally entitled to recover the freight or any part thereof, or to any lien therefor, or to any allowance in respect of it. But before proceeding to say anything about the legal questions which were argued, I must point out that, in the view I take of the facts, there are difficulties in the way of the bank's claim which appear to be insuperable.

In the first place counsel for the bank assumed that his clients were—in the position of absolute owners of the cargo—entitled to say that the seizure was wrongful ; and that their claim must be considered without any reference to the seizure as prize, or to the sale, or to the prize proceedings, or to the terms on which the consent to the release of the proceeds of the sale was given. The argument was directed as if the question was merely one between the bank and the shipowners, and dependent only upon the contract contained in the charterparty.

This same bank were interested in a cargo shipped and seized in very similar circumstances in the case of *The Corsican Prince* (3),

(1) (1873) L. R. 8 Q. B. 202.

(2) [1915] 2 K. B. 781.

(3) Ante, p. 195.

which came before this Court in February last ; and I venture to repeat what I said in that case upon the question of release by the Crown : “ The Crown has full right to consent to the release of any ship or goods captured or seized on any grounds that to the Crown may seem fit. Moreover, it does not by any means follow as a necessary consequence of the release that the goods were not properly seized as prize as the Crown’s droits of admiralty. In the present case, as the Empire of Russia is our ally in the war, it does not require a very vivid imagination to conceive grounds for giving up to the Russian Bank the proceeds of the portion of the cargo claimed by them quite other than an acknowledgment of wrongful seizure. And if it be thought material, it would be quite open to any one interested in these proceedings at any stage to allege and to set out to prove that the seizure of the cargo was lawful.”

I will add that, if it had been thought material in the interest of the bank in the present case, it would have been quite open to them to allege and to set out to prove, if they could, that the seizure of the cargo was unlawful, and that they were absolutely entitled according to prize law to have the cargo released with or without costs and expenses. That task they did not undertake. The course they were advised to take, and which they may have taken with much prudence, was to accept the release of the net proceeds of the sale of the goods upon the terms of the indemnity hereinbefore set out. These terms show clearly that the arrangement was a compromise ; and that it was by no means admitted that the Russian Bank were entitled as of right to the cargo or its proceeds.

I need hardly say that, according to the rules and practice of this Court, the Marshal acted rightly when he undertook to pay to the shipowners the “ ascertained ” freight and charges, by which I think was meant the proper amount of freight and charges to be ascertained by a reference to the registrar and merchants in accordance with the principles which have been laid down for that purpose. These payments have in part been made, and will at the end be made in full out of the proceeds in Court ; and are covered by the wide words of the indemnity.

Upon these facts I am of opinion that the Russian Bank are not

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entitled to be paid in full without any deduction for freight and expenses ; but lest my view of the result of the facts may be considered to be erroneous, and as the legal aspect of the case, and of cases similar to it, is of general importance, I will deal also with the law applicable to such cases. I can do this the more briefly because I have already had occasion to deal with the subject in some of its aspects in *The Juno* (1) and *The Corsican Prince*. (2)

The former dealt with the freight claimed by owners of a British ship (in respect of goods which were laden upon her and which were condemned as prize) as against the captors ; and the respective positions of British and neutral ships in relation to their rights to freight in such cases were compared. In the latter I considered the general question of the jurisdiction of the Prize Court to award freight to owners of British ships where the cargo was seized as prize, and where it, or its proceeds, had been released as in the present case.

In order to avoid repetition I would refer to the authorities cited in those two decisions. From them I deduced certain results and ventured to lay down the following propositions : “ The Prize Courts have constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners but also as between owners of ships and owners of cargo ; and have adjudicated upon such claims whether the ship or cargo had been released, and when both ship and cargo had been released ; and apparently no actions involving those questions in similar cases were brought in any common law Court, and this is obviously for grounds solid in justice, and convenient in practice ; because the two Courts administer two different codes or systems of law ; the Prize Courts deal with claims in accordance with the law of nations, and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-performance or non-completion of the contract of affreightment ; whereas common law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King’s Bench Courts would either give the claimants for freight the whole or nothing

(1) Ante, p. 169.

(2) Ante, p. 195.

according to whether the contract of affreightment had been performed or not ; but the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole, or a moiety, of the freight, or a sum pro rata itineris, or it may discard the contract rate altogether even as a basis for assessment or calculation (vide *The Twilling Riget* (1)), or it may withhold or diminish the sum by reason of misconduct, as, e.g., by resistance to search, or spoliation, or non-disclosure of papers."

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A passing reference was made in the judgment given in *The Juno* (2) to the case of *The Friends*. (3) It was not dealt with at length because, as was pointed out, it was between shipowners and cargo owners, and not between shipowners and captors, as was that of *The Juno*. (2) That very circumstance renders the decision in *The Friends* (3) of great importance in the consideration of the matter now before the Court. It is right, therefore, to refer to it more fully. That was the case of a British vessel which had been chartered to deliver a cargo at Lisbon. The ship had prosecuted her voyage to the entrance of the Tagus when she was warned off by the blockading squadron. A gale of wind afterwards blew her out to sea and she was captured by a Spanish privateer, but was soon afterwards recaptured by a British cruiser, and taken to Madeira, where the ship and cargo were sold by the recaptors to pay salvage. The ship and cargo were afterwards decreed to be restored. The question the Court had to decide was what freight was due in the circumstances. On the part of the owner of the ship it was contended that the whole of the freight was due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it was contended that no freight was due, as the cargo was not delivered according to the terms of the charterparty. Referring to certain cases of American ships bound to France or Holland and which were brought into this country under the prohibitory law, Lord Stowell said : " In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charterparty in the same point of view as the Courts of common law, it could not say that

(1) (1804) 5 C. Rob. 82.

(2) Ante, p. 169.

(3) (1810) Edw. 246, 247 ; 2

Eng. P. C. 48, 49.

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the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of common law do to make contracts between parties ; but as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction." And in pronouncing his decision in the case of *The Friends* (1) he delivered himself as follows : " The present case is marked with peculiar misfortune, because here, after the ship had been stopped by the blockading force, she was blown out to sea, and, being subsequently taken out of the hands of the master, she was carried by the recaptors to a distant port, and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is, upon whom the weight of it shall fall. If the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there ; but the fact is, that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other. I think, therefore, that what equity would suggest is, that the loss should be divided ; and under these circumstances I shall direct a moiety of the freight to be paid."

In the case which now falls for decision in this Court the cargo in question was seized as prize ; and its proceeds were paid into Court to be dealt with in the prize proceedings. I have pointed out that, according to the authorities and practice of the Court of Prize, the jurisdiction of the Court to deal with freight is not affected by the release of the cargo—even if it had been released upon the decision of the Court that it had been wrongfully seized, which was not the case in relation to this cargo.

(1) Edw. 246, 247, 248 ; 2 Eng. P. C. 48, 49.

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According to the common law the contract of affreightment came to an end as soon as it became illegal, because of the war, to proceed to carry the goods to their German destination, and in a Court of common law no freight could be recovered under the contract which had so come to an end. An illustration of this is afforded by the recent judgment of Rowlatt J. in *St. Enoch Shipping Co. v. Phosphate Mining Co.* (1), where the learned judge decided that no freight could be recovered by the shipowners for the carriage of cargoes of cotton, copper, phosphate, and wheat from South America which were destined for Hamburg, but which were diverted to Manchester. It must be noted in connection with this decision that, although the cargoes were in some way detained by the Customs authorities, no proceedings in prize were taken. The cargoes were given back as if they never had been interfered with by the Customs authorities, and the case was dealt with upon the footing that no seizure as prize was ever effected. I may be allowed to point out that the decision in that case, although I doubt not it was given in accordance with the law of contract, might fairly be considered commercially as producing a hardship to the shipowners. On the other hand it is satisfactory to note that, if my view of the doctrines to be applied in such cases when they come before the Prize Court is correct, a more even and equitable adjustment can be made which balances fairly the rights of the parties, where the contract which has been ended no longer regulates them. Upon the grounds on which my decision is based it becomes unnecessary for me to decide the various questions which were argued upon the construction of the bill of lading, and the effect of the "blockade and interdicted port" clause.

In my judgment the application of the Russian Bank for payment of the proceeds in full without any deduction for freight or charges fails, and I dismiss their summons with costs.

Counsel for the shipowners did not contend in these proceedings that they were entitled to the full freight as the contract freight. In one sense, it was not necessary upon this application to argue that point. But I do not apprehend that it is desired to argue it further. And so it may be convenient now to order that it be referred to the registrar and merchants to ascertain the amount due for

1915 freight or charges in respect of all the cargoes upon the principles
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Solicitor for the Procurator-General: *The Treasury Solicitor*.

Solicitors for claimant, the Russian Bank for Foreign Trade:
Coward & Hawksley, Sons & Chance.

Solicitors for shipowners: *Botterell & Roche, for Vaughan & Roche, Cardiff*.

(1) Ante, p. 169.

NOTE.—The reference was held on July 14, 1915 (*Noad* for the claimant shipowners; *R. A. Wright* for the Russian Bank), and on July 20, by his report, the Registrar stated that “the full freight on the cargo discharged was clearly due—indeed, it was not contested—and the proportion payable by the Russian Bank became therefore a matter of adjustment of accounts. The second head of the claim was for dock dues and other charges at Barry which, it was argued, were payable to the owners of the *Iolo*. . . . I am of opinion that these charges cannot be allowed. The *Iolo* came into Barry in consequence of the war. She would have had to go there or to some other port. It is true that her cargo was seized there; but the primary cause of these charges was not the action of the Crown as captors, but the impossibility of going to Hamburg. . . . The third head of the claim was for demurrage, or, as Mr. Noad phrased it, damages for detention. This claim is clearly not allowable on several grounds—(1.) if damages, there has been no decree awarding the claimants damages;

(2.) if regarded as detention, this claim is not allowable by the decision of the Court in *The Juno* [1916] P. 169. These grounds would alone be sufficient for the rejection of this head; but I may add that there would necessarily have been some delay in dealing with the cargo if it had not been seized, the consignees being at Hamburg. There is no evidence that there was any unreasonable delay of the Crown or the Marshal in dealing with the cargo, or that the time lost at Barry was greater than would have been the case if the cargo had not been seized. The Russian Bank has offered the sum of 1120*l.* in payment of freight and charges due from them. The total freight payable is 2090*l.* 0*s.* 4*d.* and of mat money 28*l.* 3*s.* 10*d.*; the amount in respect of the share of the Russian Bank is 1103*l.* 17*s.* 10*d.*, and in respect of mat money 14*l.* 18*s.* 10*d.*, making a total of 1118*l.* 16*s.* 8*d.* in respect of the claim referred to me and due to the claimants. . . .”

On November 8 the President rejected a motion on behalf of the shipowners in objection to the report, and the learned judge confirmed the report without costs, refusing leave to enter an appeal.

T. L. M.

IN THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE AND ADMIRALTY DIVISION.
 ADMIRALTY.
 (IN PRIZE.)

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THE TREDEGAR HALL.

[1915, No. 3.]

Prize Court—Freight—Shipowner's Expenses incurred by compulsory Deviation.

As indicated in the judgment in *The Juno* (ante, p. 169), British shipowners, in war time, are not permitted to claim for any delay or inconvenience incurred by reason of the diversion or detention of their vessel for the purpose of seizure and making unlivery of confiscable enemy property. The loss (if any) to the shipowner results from the war and must be submitted to, just as he is not entitled to bring into the estimation of the freight any alleged excess in the cost of discharging at the port at which the vessel actually delivered the cargo, and the cost at the port to which she was originally destined.

THE British steamship *Tredegar Hall*, shortly before the outbreak of war, shipped a cargo of maize at San Lorenzo and Ramallo, in the River Plate, for delivery at Hamburg and Emden. On August 4, 1914, Lloyd's, of London, telegraphed to the owners of the vessel, Edward Nichol & Co., to the effect that, owing to the outbreak of war on that day, the Admiralty suggested the diversion of the vessel to a port in the United Kingdom, and on August 5, when off Portland, Lloyd's signalled to the master that the vessel was to proceed to the nearest British port, and she accordingly, on the same day, put into Weymouth. On August 9, under Admiralty orders, she went into Portland Harbour, and on August 12 received orders for Avonmouth; but whilst on her passage the owners were instructed by the Admiralty to send the vessel to Cork. She entered Barry Dock for bunker coal, and arrived at Cork on August 16, where the condemned cargo was discharged, the freight for the carriage of the cargo to its intended destination (Hamburg and Emden) being paid by the Admiralty.

The owners of the steamship claimed 1839*l.* 4*s.* 4*d.* as freight

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earned between Weymouth and Cork, including detention at Weymouth and Portland, or, in the alternative, they claimed 16*l.* 14*s.* 8*d.* as the sum representing the excess of the cost of discharging at Cork as compared with Hamburg and Emden.

Laing, K.C., and *R. A. Wright*, for the Procurator-General. The shipowners having received the full freight which they would have earned had they carried out the terms of the charterparty are not entitled to anything further by way of compensation for delay or in respect of charges arising out of the delivery of the cargo at Cork.

The alternative claim is, in fact, for expenses resulting from the detention of the ship, and—apart from the difficulty of ascertaining in time of war what the difference would be between the cost of delivering at the actual and the estimated cost at the original intended place of discharge—is not allowable. The cargo could not be delivered at Hamburg or Emden, and Cork was the best available substitute.

Dunlop, for the claimant shipowners. It is submitted that the case falls within the ruling of this Court in *The Juno* (1), and that the claim for freight and expenses should be allowed, or should be admitted by way of developing the principles laid down in that case, and a direction should be given to the Registrar to allow what was fair and reasonable in the circumstances. In *The Roumanian* (2) this Court allowed the shipowners pro rata freight and charges for landing and storage. In the same case a reference is made in the judgment to *The Venus*, a case extracted from Mr. Rothery's notes in which rewards were bestowed on the master and the receiver of Admiralty droits at Plymouth for bringing the ship, with enemy cargo, into and seizing her in a British port, and on this ground also the claim of the shipowners might be allowed.

Sept. 9. THE PRESIDENT (SIR SAMUEL EVANS). The claim made by Messrs. Edward Nichol & Co. is to a considerable sum of money, amounting to 1839*l.* 4*s.* 4*d.*, over and above the full freight which would have been due to the vessel under the charterparty if the goods had been delivered at Hamburg and Emden.

The vessel was brought into this country by reason of a telegram,

(1) Ante, p. 169.

(2) [1915] P. 26; [1916] 1 A. C. 124.

through Lloyd's, to the master of the vessel ; and certain movements became necessary in the interests of the cargo, and also in the interests of the vessel herself, whereby she finally found herself, not at Hamburg or Emden, but at Cork, where the cargo was delivered, and where the ship was set free. There might be some question to be determined, in accordance with the principles I laid down in *The Juno* (1), as to the amount of freight to which this vessel was entitled in these circumstances ; but no such question remains open in this particular case, because the Crown (through the Procurator-General) have paid to the shipowners the whole of the freight, so that no reference is necessary. An attempt is now made to get something over and above that freight by way of compensation for delay, or inconvenience in taking the vessel from one place to another, and landing her cargo ultimately at Cork.

I said in *The Juno* (1) that no sum ought to be allowed to British shipowners in respect of any delay or inconvenience which might occur to a ship as the result of her diversion or detention for the purpose of seizure, and making the unlivery of confiscable enemy cargo. When I referred to the inconvenience or delay in the latter part of my judgment I intended to include any inconvenience or delay caused by the detention or diversion of the vessel from her chartered course. That is made clear, I think, in the final paragraph. In this case nothing happened except the delay and inconvenience which was caused by her diversion by reason of the war. It is a loss, if it be a loss, to the shipowners which results to them from the war, and for which, unfortunately, they cannot have any compensation. It is a loss like the losses which have to be submitted to by other citizens in other capacities and other walks of life. I think, in this case, that the owners of the vessel have been generously treated. They have been paid their full freight. If she had tried to proceed to Hamburg, I do not think it requires a very lively imagination to see what would have happened to her if she had not been diverted to this country by reason of her voluntarily coming in, or by the action of His Majesty's cruisers.

With regard to the alternative claim of 16*l.* 14*s.* 8*d.*, that is a claim which the shipowners put forward upon a comparison of estimated charges at Hamburg and Emden with the charges which have been

(1) Ante, p. 169.

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borne at Cork. It is a small sum, but I am asked to deal with it as a question of principle. I am referred to what I did in the case of *The Juno*. (1) My recollection is that the special items which I said ought to be allowed in that case were not allowed on any principle at all, but because I thought, having regard to all the circumstances of that case, that it would be the generous and proper thing to do, to give the extra costs which were there allowed. But if I am to deal with it as a question of principle—as I am asked to do to-day—I think it is quite clear, apart from the difficulties of ascertaining any sum of this kind, as has been pointed out by counsel for the Crown, such as the difficulty of comparing the cost of discharging at Cork during war time, and the cost of discharging at Hamburg and at Emden, when the vessel arrived there (if she had really finished her course), that these losses are losses which the shipowner must bear by reason of the war, and which he is not entitled to have brought into account in the estimation of the freight, according to the principles which I have laid down.

The claim of Messrs. Edward Nichol & Co. must be disallowed.

Leave to enter an appeal within a month, security for costs 150l.

Solicitor for the Procurator-General: *The Treasury Solicitor*.
Solicitors for claimant shipowners: *Holman, Birdwood & Co.*

(1) Ante, p. 169.

T. L. M.

IN THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
 ADMIRALTY.
 (IN PRIZE.)

THE NINGCHOW.

[1915, No. 213.]

Prize Court—Enemy Pledgor of Cargo—Default in respect of Advances—Contract of Sale by Pledgee—Loss of Right to redeem—Release to Purchaser.

A British steamship, before the outbreak of war between Great Britain and Germany, left Hankow with sundry packages of tallow, shipped by a German, and consigned to a British, firm. On arrival at Liverpool, after the outbreak of war, the consignees declined to take delivery of the goods from enemy subjects. Thereupon a Japanese bank, which, at the time of shipment, had made advances in respect of which the shippers were in default, exercised, as indorsees and holders of the bill of lading, their power of sale, by entering into a contract to sell the goods to a British firm. On the seizure of the tallow by the Customs authorities as prize:—

Held by the President (Sir Samuel Evans), that the goods must be released to the purchasers, for, when the contract of sale was made, the enemy pledgors lost their right to redeem, and thereby ceased to be owners. The goods were, therefore, not subject to seizure as enemy property.

APPLICATION by the Procurator-General on behalf of the Crown for the condemnation, as prize, of sundry packages of vegetable tallow, part of the cargo of the British steamship *Ningchow*, and seized by the Customs authorities as enemy property whilst warehoused at Liverpool after the outbreak of war between Great Britain and Germany, though shipped at Hankow before the war.

The facts fully appear from the judgment, and the short point was: whether the parcel of tallow in question was, at the time of seizure, the property of the enemy (German) shippers or (as found by the President) had passed to a Japanese bank which held the bills of lading as pledgees in respect of advances, and who had, on default by the pledgors, entered into a contract for the sale of the goods to a British firm.

1915 *Aspinall, K.C., H. C. S. Dumas, and E. C. Trehern* (for *G. Langton*, serving with His Majesty's Forces), for the Procurator-General.

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D. M. Hogg, for the claimants, the Yokohama Specie Bank, pledgees, and *Thornett & Fehr*, purchasers of the tallow, who made common cause with the bank.

The arguments of counsel are set out in the judgment.

Cur. adv. vult.

1915. June 4. THE PRESIDENT (SIR SAMUEL EVANS). The subject-matter of this claim consists of 233 packages of green vegetable tallow which formed part of the cargo laden on the steamship *Ningchow*, of Liverpool. This part of the cargo was seized by the officers of His Majesty's Customs at the port of Liverpool on October 29, 1914.

The claimants are the Yokohama Specie Bank, Limited, of 7, Bishopsgate, in the city of London, subjects of His Majesty the Emperor of Japan; and *Thornett & Fehr*, of Baltic House, in the city of London, tallow brokers, subjects of His Majesty the King of this realm.

The goods were shipped at Hankow before the war, and were consigned by subjects of the German Empire. The vessel in which they were laden arrived in the port of Liverpool on August 17, 1914.

The Yokohama Bank were indorsees and holders of the bills of lading representing the goods at the time of the shipment, and at the time of their arrival at Liverpool, and were at all material times up to the contracts of sale of October 14 and 22, 1914, hereinafter referred to, the pledgees of the goods, in respect of advances amounting to about 660*l.* made upon the security of their pledge. These advances had been made before the commencement of the war. The rights of the bank have therefore to be regarded upon principles applicable to ante bellum conditions, as nothing happened subsequently which affected these rights.

The pledgors were enemy subjects, Messrs. Schnabel, Gaumer & Co.

The enemy subjects had contracted to sell the goods to a British firm, Messrs. MacAndrew, Moreland & Co., who declined to take up

the documents representing the goods, or to take delivery of the goods themselves after the declaration of war, from enemy subjects.

Thereupon the bank, as pledgees, proceeded to deal with the goods. It was admitted by counsel for the Crown that the enemy subjects, who were the pledgors to the bank, were in default, and that the bank as pledgees by reason of such default, and after the requisite notice to their pledgors, became entitled to exercise their power of sale, in order to make the pledge effective before the goods were seized as prize.

The bank accordingly, in exercise of their rights as pledgees, entered into two contracts of sale with Messrs. Thornett & Fehr, dated respectively October 14 and 22, 1914, whereby they contracted to sell the goods in question to Thornett & Fehr on the terms set out in the written contracts.

Counsel for the Crown contended (1.) that Thornett & Fehr were not real purchasers, but only brokers acting on behalf of the bank ; and (2.) that, even if they were the purchasers, the property in the goods had not passed to them ; and that, notwithstanding the contracts of sale, the goods remained confiscable as enemy property belonging to the pledgors.

As to the first contention, I was satisfied upon the evidence, and find as a fact, that Thornett & Fehr were not acting as brokers, but as principals. Upon the second contention, arguments were addressed to the Court that, according to the law applicable to the sale of goods, the property in the goods had not at the time of their seizure passed to the intending purchasers ; and that the goods still remained the property of the enemy subjects notwithstanding their pledge to the bank, and the action that the bank took.

In my view the inquiry as to whether the property in the goods had so passed is irrelevant upon the question which has to be determined in this case, which is whether the goods belonged to enemy subjects at the time of the seizure.

The rights of a pledgee have been succinctly stated in the judgment of Cotton L.J. (which was the joint judgment of the Lord Justice himself and of Lindley and Bowen L.JJ.) in the case of *In re Morritt* (1), in this passage : " A contract of pledge carries with it the implication that the security may be made available

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to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale."

As I have before said, it was admitted by counsel for the Crown that in this case there was default by the pledgors, and that notice had been given by the pledgees, before they entered into the contracts for sale. In short, it was admitted that the pledgees were entitled to exercise their power of sale.

I think that the phrase in Cotton L.J.'s judgment that the pledgor may redeem "at any moment up to sale" means at any moment up to the time of the exercise by the pledgee of his power of sale by entering into a valid contract for sale.

The right of the enemy pledgors to redeem had therefore been lost to them ; and accordingly they ceased to be in any sense the owners of the pledged goods when the bank contracted to sell, apart entirely from any question which might exist as between the sellers (the pledgees) and their purchasers of whether, according to the law of the sale of goods, the property remained in the sellers, or had passed to the purchasers.

In the view I take of the case it is unnecessary to deal with the facts relating to the orders to the warehousemen to hold the goods for the purchasers.

I hold that when the contracts for sale of October 14 and 22 were made the enemy pledgors had ceased to be the owners of the goods which were subsequently seized.

These goods were therefore not subject to seizure as enemy goods.

The bank and the purchasers from them make common cause, and the bank assent to the claim of their purchasers.

I decree accordingly that the goods in question be released to the claimants, Messrs. Thornett & Fehr.

Solicitor for the Procurator-General : *The Treasury Solicitor.*

Solicitors for claimants : *Crossley & Burn.*

T. L. M.

IN THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
 ADMIRALTY.

(IN PRIZE.)

THE SCHLESSEN.

[1915 S., No. 828.]

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March 23.

Prize Court—Enemy (German) Ship—Enemy (Austrian) Cargo—Cargo seized before Declaration of War—Continuous Seizure—Jurisdiction—Hague Convention No. VI., arts. 3 and 4.

After war had broken out between Great Britain and Germany, a German merchant vessel was seized by one of His Majesty's ships of war and taken, with her cargo, owned by Austrian subjects, into Plymouth. A writ was issued against the cargo some hours before the outbreak of hostilities between Great Britain and Austria, and a second writ was subsequently issued against the cargo which remained in the custody of the Customs authorities until, by consent, sold by the Marshal and the proceeds paid into Court:—

Held by the President (Sir Samuel Evans), that the goods, or their proceeds in Court, must be condemned as good and lawful prize, for the goods were, and were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary, and, therefore, although unlivered from the vessel in port, these goods were, according to the decision in *The Roumanian* [1915] P. 26, subject to seizure, and must be regarded as enemy property not protected by the Hague Convention No. VI., as Germany had declined to accede to art. 3 in respect to the protection to be afforded to a merchant ship, and that article is supplemented by art. 4 in respect of the cargo.

THE *Schlesien*, a German steamship of Bremen, with Austrian cargo on board, was taken at sea by a King's ship on August 7, 1914, and brought into Plymouth. On August 11 a writ was issued against all the cargo on board the vessel. This was some hours before war commenced with Austria, which was at midnight on August 12. Unlivery began on August 15.

On November 30, 1914, the vessel was condemned as prize by the President, together with some submarine signalling apparatus, which was held by the learned judge to be attached to and to form part of the ship, although the alleged neutral owners of the apparatus

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contended that it was only leased to the shipowners subject to a yearly rent.

To put the matter of the writ in order, a new writ was issued on December 7, claiming the goods as the property of the Crown, alleging continuous seizure, and asking "for a decree that the said goods, which on and after the outbreak of war between Great Britain and Austria-Hungary were and remained in the custody and possession of His Majesty's officer of Customs at Plymouth as prize of war and as droits of admiralty, belonged on the outbreak of war as aforesaid and afterwards to enemies of the Crown."

As the goods, with the consent of the parties concerned, had been sold by the Marshal, the rubber on January 28, and the remainder on August 15, 1915, the claim raised, on the present application by the Crown for condemnation, was in respect of the proceeds. The goods in question, consisting of white gum, rubber, and gamboge, were shipped by the branch house at Bangkok of Alois Schweiger & Co., Limited, a company incorporated in Vienna, and counsel for the claimants appeared on behalf of Mr. Kempton, the manager of the Manchester branch of the company, the claim being made by the branch at Bangkok as shippers of the goods to the Manchester branch, an appearance having been entered on August 21, 1914.

Maurice Hill, K.C., and *R. H. Balloch*, for the Procurator-General on behalf of the Crown. It is admitted that the goods in question were sold by the Marshal before the issue of the second writ, and, therefore, the writ is against the proceeds; but it is submitted that the Procurator-General is entitled to an order of condemnation, the position being that these goods, now represented by the proceeds, were taken at sea and brought into Plymouth on August 7, 1914, and the vessel, an enemy ship, of which they formed part of the cargo, lay there, in the custody of the Customs, until August 15, so that, at the time war was declared against Austria, the goods were already in the custody of the Customs on behalf of the Crown, and so remained, they being at such time enemy property within the jurisdiction of the Prize Court: see *The Roumanian*. (1)

The rules laid down by the Sixth Hague Convention, arts. 3 and 4, as to enemy vessels, in circumstances similar to the present

case, being only liable to detention, do not apply, as Germany declined to accede to the terms of art. 3, and the effect of the two articles being to produce an identification of ship and cargo, it follows that the enemy (German) ship not being protected, neither is the enemy (Austrian) cargo.

Latter, for the claimants, Alois Schweiger & Co. The seizure was wrongful and could not operate on these goods—that is to say, according to the evidence, the alleged seizure took place at a time when the goods were not liable to seizure, for they were then neutral goods on an enemy (German) vessel before the outbreak of war between Great Britain and Austria, the result being that, though reliance is placed in the second writ upon the alleged seizure, there has never been any valid seizure of the goods in question.

I rely upon this my first point, and, in view of the decisions in this Court, do not press here the effect, in my favour, of arts. 3 and 4 of the Sixth Hague Convention.

1916. March 23. THE PRESIDENT (SIR SAMUEL EVANS). The Court is now dealing with three consignments, being part of the cargo on the ship *Schlesien*: they are fifty-four cases of white gum, twenty-seven cases of rubber, and six cases of yellow gamboge. All those parcels have been sold in the course of the prize proceedings, and are now represented by the proceeds which have been paid into Court as the result of those sales. It is admitted that the property belonged to Austrian subjects, and in that sense was enemy property.

Some curious points arise in this case. The cargo in question was laden on board an enemy ship, a German ship. That ship has been condemned in this Court as a German ship. She was encountered on the high seas on August 7, 1914, after war broke out between this country and Germany, but before war existed between this country and Austria-Hungary. Whether the ship when encountered upon the high seas was still ignorant of the outbreak of hostilities I do not know, but, in any event, that does not matter, because assuming for the purposes of this case, as I have done in others, that the Hague Convention is to be regarded as binding as between this country and Germany, Germany could not claim any privilege under art. 3, because it is one of the articles in respect of which Germany

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made a reservation. She also reserved the privileges which would have been accorded to the cargo on a vessel to which art. 3 applied by the second part of art. 4.

Two points are raised by counsel on behalf of the owners of these goods. He says that there was no seizure of this property after the seizure on August 7, and that that was not then a proper seizure, because at that time the goods were not enemy property ; and that if the matter had to be determined as at that time they were the property of neutrals on board an enemy ship, and as such would be protected. The cargo is brought on board the ship into a British port, and the writ was issued on August 11. It was pointed out when I was dealing with the cargo upon another occasion that the writ was issued before the outbreak of war between Austria-Hungary and this country, and an adjournment was granted in order that the Procurator-General might, if so advised, issue a new writ in respect of this cargo. A new writ has been issued. Now, the hand of the Crown authorities, which was not effectively placed upon the goods upon August 7, 1914, still remained upon the goods at midnight on August 12, 1914. It may be—I express no opinion upon it—that if at that time the owners of the goods had said “ Well, now these goods have not been seized,” or at any time up to the 12th they had said “ These goods cannot properly have been seized because no war exists between us,” that point might have been raised ; but no such point was made, and the hand of the Crown remained on the goods from August 12 until they were sold, and, as I understand, sold by consent, at any rate as to the greater part, in these prize proceedings. * In these circumstances I cannot come to any other conclusion but that there was a seizure—that the goods were intended to be held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary. If that is so, according to the decision in *The Roumanian* (1), these goods, although unlivered from the vessel in port, were still goods which were subject to seizure, and they must be regarded as enemy property.

Now the second point which was made by counsel for the claimants arises under the Hague Convention, assuming it to be

(1) [1915] P. 26 ; affirmed on appeal to the Privy Council [1916] 1 A. C. 124.

applicable. He did not elaborate the point, but he was within his rights when he declined to give up the point notwithstanding the difficulties in his way. It is impossible to fit in the first part of art. 4 with arts. 1 and 2 of the Hague Convention in reference to this particular cargo, because the first part of art. 4 refers to enemy cargo on board an enemy merchant ship in an enemy port at the commencement of hostilities.

The facts of this case do not bring it within those two articles at all. Then we come to art. 3. Art. 3 does not protect the ship for the reason that I have given, that Germany could not rely on it in any event, and I think that the second part of art. 4 must have been intended to apply to German goods upon a German ship, if it came within art. 3. It refers to enemy cargo : it must be read as enemy cargo, on board an enemy ship encountered on the high seas, in the circumstances set out in art. 3. I think the difficulties in the way of counsel for the claimants under arts. 3 and 4 are not only great but insuperable. I do not think that these goods are protected under art. 4.

The judgment of the Court, therefore, is that these goods, or their proceeds now in Court, must be condemned as good and lawful prize.

Solicitor for the Procurator-General : *The Treasury Solicitor*.

Solicitors for claimants : *Waltons & Co.*

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PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

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(IN PRIZE.)

THE PALM BRANCH.

[1914, No. 200.]

Prize Court—Cargo—Insurance against War Risks—Neutral Property at Date of Seizure—Property in Enemy Underwriters at Date of Claim—Condemnation.

Certain goods seized as prize were insured against war risks by enemy underwriters in Hamburg. At the time of seizure the property in the goods was in the shippers, who were neutrals. After the seizure the shippers' German agents claimed against the underwriters for a total loss. The underwriters paid in full and thereupon became owners of the goods, and the claim filed by the shippers in the Prize Court proceedings in fact was made on behalf of the underwriters :—

Held, that the claim must be disallowed, and that the proceeds of the goods (which had been sold) must be condemned as enemy property.

SUIT FOR CONDEMNATION OF CARGO AS PRIZE AND DROITS OF ADMIRALTY.

Before the outbreak of war between Great Britain and Germany 4000 bags of cocoa were shipped at Guayaquil on the British steamship *Palm Branch* by the Asociacion de Agricultores del Ecuador consigned to their order, Hamburg. Under an option the cocoa was to be delivered to a German firm, Schlubach Thiemer & Co., at Hamburg for sale on commission. On August 3, 1914, the *Palm Branch* arrived at Liverpool, and on September 18 various portions of cargo, including the cocoa, were seized as prize. After the seizure Schlubach Thiemer & Co. claimed against the German underwriters in Hamburg, who had insured the cocoa against war risks, for a total loss, and the underwriters paid in full. A lengthy correspondence between the parties then ensued, but no steps were taken in the prize proceedings as regards the cocoa, which had been sold and the proceeds paid into Court, until October 6, 1915, when, under pressure by the underwriters, an appearance was entered on behalf of the Asociacion de Agricultores del Ecuador, and on October 29

a claim was filed in which it was alleged that the goods (or their proceeds) "were *and are* the property of the claimants."

The circumstances under which the claim was made are set out in the judgment.

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Sir George Cave, S.-G. (H. Hull with him), for the Procurator-General. At the time of seizure the property in the goods had passed to Schlubach Thiemer & Co., the selling agents: see *The Kronprinzessin Cecilie*. (1) But even if at the date of seizure the property was still in the neutral shippers, when the German underwriters paid on the basis of a total loss, the property vested in them as from the time when the loss occurred, namely, the moment of seizure: *Simpson v. Thomson* (2); see also *The Red Sea* (3); *The Crystal* (*Arrow Shipping Co. v. Tyne Improvement Commissioners*) (4); the Marine Insurance Act, 1906, ss. 63 and 79; and Arnould's Marine Insurance, 9th ed., s. 1213.

Even if the underwriters only became owners from the time of payment and the goods when seized were neutral property, the hand of the Crown has always remained upon them or their proceeds, and, if necessary, a fresh writ can be issued: *The Schlesien*. (5) But in this case it is not necessary. The Court can look beyond the actual names on the record to see who in fact are the parties making the claim; and there can be no doubt that the claim is really brought by the underwriters in the name of the shippers. At the time the appearance was entered and the claim was filed the goods were enemy property; the writ, therefore, is good, and the proceeds of sale should be condemned as enemy property.

MacKinnon, K.C. (C. R. Dunlop with him), for the claimants. The Prize Court will only inquire into the question as to who were the legal owners at the time of seizure, and will not have regard to further contractual obligations affecting the parties: *The Odessa* (6); see also *The Miramichi*. (7) At the time of seizure the property in the goods was in the neutral shippers, and even if afterwards the German underwriters became beneficially interested and the

(1) (1915) 1 Br. & Col. P. C. 623.

(5) Ante, p. 225.

(2) (1877) 3 App. Cas. 279, 292.

(6) [1915] P. 52; [1916] 1 A. C.

(3) [1896] P. 20, 24.

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(4) [1894] A. C. 508.

(7) [1915] P. 71.

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claimants would have to account to the underwriters for the proceeds, that is not sufficient ground for disallowing the claim. The fact that the underwriters have paid, whether they were liable to do so or not, gives them a right of subrogation: *King v. Victoria Insurance Co.* (1); and the proceedings are rightly brought in the name of the neutral assured. There is no reported case in which a Prize Court has investigated questions of insurance, and in *The Gothland* (2) the Court declined to consider the claims of neutral underwriters. Cargoes are not usually insured by one company alone, and to investigate questions of insurance in most cases would involve an inquiry into the status and nationality of a number of different companies and into the ramifications of the various re-insurances. In the present case $2\frac{1}{2}$ per cent. of the risk was re-insured with English companies. Further, in the case of a vessel, it may not have been insured for its full value, in which case the owners would be deemed to be the insurers of the uninsured balance: Marine Insurance Act, 1906, s. 81. Therefore the whole vessel would not pass to the underwriters on payment as for a total loss, and the owners would be entitled pro rata to the amount of the uninsured value: see *The Commonwealth* (3) and Arnould's Marine Insurance, 9th ed., s. 1187. [*Ruys v. Royal Exchange Assurance Corporation* (4), *Polurrian Steamship Co. v. Young* (5), and *The Ariel* (6) were also referred to.]

Sir George Cave, S.-G., replied.

Cur. adv. vult.

1916. July 31. THE PRESIDENT (SIR SAMUEL EVANS). A novel point arises upon this claim by reason of a change of ownership of the goods seized between the dates of the seizure and the claim.

The goods seized were 4000 bags of cocoa laden on the *Palm Branch*, a British vessel, and shipped before the war. They were consigned by the shippers, the Asociacion de Agricultores del Ecuador, to their own order; and under an option they were to be delivered at Hamburg to a German firm, Schlubach Thiemer & Co., as agents for sale of the shippers. They were invoiced at 18,676*l*.

(1) [1896] A. C. 250.

(2) See note on p. 239, post.

(3) [1907] P. 216.

(4) [1897] 2 Q. B. 135.

(5) [1915] 1 K. B. 922.

(6) (1857) 11 Moo. P. C. 119.

with a deduction of 1143*l.* for freight. After the goods were seized they were sold under an order of this Court and realized 20,285*l.* gross. The claim is for the release of the proceeds of sale.

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The goods were insured against war risks by German underwriters of Hamburg. At the time of seizure the property in the goods had not passed from the neutral shippers. After the seizure Schlubach Thiemer & Co., the shippers' agents in Germany, made a claim against the Hamburg underwriters for a total loss. The underwriters paid the claim in full. Schlubach Thiemer & Co. received it for the claimants, and, as appears in the affidavit of Roderick Schlubach, dealt with it in account. It was ultimately admitted that thereupon the German underwriters became owners of the goods.

The claim in these proceedings was not made until nearly a year later. The position is not in dispute. It is that at the time of the seizure the property in the goods was in the neutral shippers; and at the time of the claim in the German underwriters. The question is what, in view of this position, the judgment of this Court should be. For some time the shippers were disposed to put forward a claim to the goods upon the assumption that the property remained in them. Schlubach Thiemer & Co. protested against that attitude, and practically said to the shippers "Hands off," on the ground that the goods belonged to the underwriters. In accordance with their view, and pursuant to the request of the underwriters, the bills of lading were indorsed successively to de Waal Duyvis & Co., Wamber-sie & Co., Kruthoffer & Doll, and generally. Explanations of these indorsements were offered. They are not satisfactory. What is plain is that they were intended to found or support a claim by or on behalf of the underwriters.

Schlubach, in the affidavit already referred to, deposed that his firm was requested by the underwriters to forward the bills of lading and all the documents relating to the goods in question to Kruthoffer & Doll, of Rotterdam, in order that they might claim the goods from the British authorities. For this purpose Kruthoffer & Doll engaged the services of a firm of Wendt & Co., of London. This firm for some time were under the impression—and naturally under the impression—that Kruthoffer & Doll were the neutral (Dutch) receivers of the goods. It is clear that Kruthoffer & Doll so claimed the goods. Ultimately Wendt & Co. knew that Kruthoffer & Doll

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were not genuinely the receivers, but were only acting for the German underwriters to try and secure the goods for them. The underwriters had not only become in law the owners of the goods upon payment of the total loss claim, but they asserted their position and assumed and asserted dominion over them.

When the case first come before me, a long correspondence was given in evidence, which, however, did not go beyond May 10, 1915. In order to ascertain how the claim came to be made ultimately on behalf of the Ecuador Association in October, 1915, and to find out who the real claimants were, I adjourned the hearing, and directed that all the communications between the German and Dutch firms and the Ecuador Association and their representatives and Wendt & Co. should be placed before the Court. The complete correspondence is voluminous. It would be a waste of time to refer to it in detail. It speaks for itself. Schlubach protested against any claim or interference by the shippers on the ground that they had agreed to abstain from so acting, and that the goods had become the property of the underwriters, and that the latter had the sole right to claim the proceeds of the sale of the goods, including the excess of their insured value. Wendt & Co. were not acting for the shippers. Schlubach Thiemer & Co., however, insisted so far as they could upon the shippers' London representatives co-operating with Wendt & Co. to protect the interests of the German underwriters before the Prize Court in order to obtain from them the refund of the proceeds of the sale of the cocoa. The shippers, after having received from Schlubach Thiemer & Co. account sales for the amount paid for the total loss by the underwriters, instructed their representatives not to make any claim to the goods or their proceeds, or to do anything further in the matter. They appreciated the situation perfectly, as is seen by their letter to their representative on March 20, 1915, in which they say: "The underwriters, when paying Schlubach and receiving from him the bills of lading in order to make themselves the owners of the cocoa, no doubt thought that they would completely avoid their loss and even do a good stroke of business with the present high price of cocoa, and therefore they no doubt commenced their steps in order to recover it." The cocoa was sold above the invoice price in this country; and would have fetched a much higher price still if sold in the German markets.

The correspondence disclosed after the adjournment shows that Schlubach Thiemer & Co., by threats and otherwise, continued to insist upon the neutral shippers at Ecuador either making a claim in their own name, or allowing it to be made in their name by the German underwriters. [His Lordship read a number of letters and continued as follows:]

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Wendt & Co. in September, 1915, for some reason not stated, changed their name to W. K. Webster & Co., in which guise they appear after that date. They displayed under both appellations a zeal and energy for German underwriters which may deserve and possibly obtain praise and recognition from them. Knowing the real claimants, they pressed for a power of attorney from the neutral shippers to make a claim to the goods in this Court.

Meantime Wendt & Co. (then W. K. Webster & Co.) caused an appearance to be entered for the "Asociacion de Agricultores del Ecuador" on October 6. They also caused a claim to be filed on October 29, 1915, on the ground that "the goods were *and are* the property of the claimants, who are neutrals."

A couple of months afterwards they received an authority prepared by themselves, signed by the Ecuador Association at Guayaquil on November 26, 1915, to instruct solicitors to appear and claim the goods or the proceeds thereof or such part thereof as such solicitors should consider they were entitled to claim. The method and object with which this was obtained have been sufficiently indicated. The underwriters were to pay the costs of the proceedings. Before this authority was received or even signed, Wendt & Co. had been advised by counsel that after the seizure of the goods the property had passed to enemy underwriters. The claim is undoubtedly made on behalf of these underwriters; and if the proceeds were released to the claimants it was admitted that they would receive them as trustees for the Germans, and would have to pay them over accordingly.

What, in the circumstances, is the order which the Court should make?

It was contended that the Court should only inquire into the real tangible ownership at the time of seizure without regard to any contractual obligations or complications on the principles stated

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in *The Miramichi* (1) and *The Odessa*. (2) I adhere to the views expressed in those cases. But I apprehend that the question now raised is a different one. The absolute ownership of enemy traders at the time of the claim and the hearing is as clear as that of the neutral consignors at the time of seizure. When, at the time of the claim and now, the goods were and are the property of enemy owners who are the claimants in reality, although not in name, should the Court order the release of the goods to the nominal claimants admittedly for the benefit of the enemy owners ?

There does not appear to be any reported decision governing the case. But the practice and forms of the Prize Court for a lengthened period aid to a decision consonant with recognized principles and sound sense. In the "Formulare Instrumentorum" of Sir James Marriott, a judge of the Courts of Admiralty in Prize and Instance (published as "perused and approved as correct" by the learned judge in 1802), will be found an Order of the Prize Court dated April 29, 1779 (see p. 1). It is as follows :—

"Ordered,

"That in every affidavit to be offered by any neutral claimant in further proof of his property, the claimant shall make oath that the several goods claimed did belong to the claimant at the time of lading, and at the time of the capture, and do *belong at the present time*, and would have so belonged in case that the said goods had not been seized and taken, and *will belong to the claimant in case the same shall be restored* and arrive, and be unladen at the original and true port of destination, until the said goods shall be sold or disposed of for the sole account and benefit of the said claimant. And that neither the King of France nor his vassals and subjects, nor any persons inhabiting within his territories or dominions, nor any inhabitants of the British American colonies in rebellion, nor their factors or agents, nor any person whosoever, other than the said claimant, *have, hath, or had* any right, title, or interest in the said goods at the said several periods of time, *nor will have* until sold or disposed of in manner and for the real account of the claimant as aforesaid.—James Marriott."

So in the form of an attestation in support of a claim for a ship, there is an oath that "no enemies of the Crown of Great Britain,

(1) [1915] P. 71.

(2) [1915] P. 52 ; [1916] 1 A. C. 145.

had at the time of capture *or now have*, directly or indirectly, any right, title or interest in the ship, her tackle, apparel and furniture or in any part thereof " (see the "Formulare," pp. 209—211, also the usual form of claim as made in *The Fortuna* (1)).

In the Standing Interrogatories in force at the end of the eighteenth century (2) is the following :—

" XII.—*Interrogate.* What are the names of the respective laders or owners, or consignees, of the said goods ? What countrymen are they ? Where do they now live and carry on their business or trade ? How long have they resided there ? Where did they reside before, to the best of your knowledge ? And where were the said goods to be delivered, and for whose real account, risk or benefit ? Have any of the said consignees or laders any, and what, interest in the said goods ? If yea, whereon do you found your belief that they have such interest ? Can you take upon yourself to swear that you believe, that at the time of the lading the cargo, *and at the present time, and also if the said goods shall be restored and unladen at the destined ports, the goods did, do, and will belong to the same persons, and to none others ?* "

Also, in Interrogatory XXX. as to the ship is contained this question : " Do you verily believe that if the ship should be restored, *she will belong to the persons now asserted to be the owners, and to none others ?* "

In the letter of Sir William Scott and Sir John Nicholl (dated September 10, 1794) to Mr. Jay, United States Minister to England (afterwards Chief Justice Jay), in describing the steps to be taken in prize proceedings by claimants they say : " The master, correspondent, or consul applies to a proctor, who prepares a claim, supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed, *belong* ; and that no enemy *has* any right or interest in them." This was reproduced in Story's Notes on the Practice (Pratt's Story, p. 7).

This practice was adopted in the United States of America. In *The Schooner Adeline* (3) it was said by the Supreme Court that " the test affidavit should state that the property, at the time of shipment

(1) (1795) 2 C. Rob., Appendix V. pp. 381, 383, 387.

(2) These Interrogatories are (3) (1815) 9 Cranch (13 U. S.), printed in 1 C. Rob., Appendix I., 244, 286.

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and also at the time of capture, did belong, *and will, if restored, belong to the claimant. . . .*"

The forms of claim and affidavit in support were the same at the time of the Crimean War. The form of affidavit will be found in a note to *The Panaja Drapaniotisa*. (1) I extract from the affidavit the following paragraph :—" And the appearer further made oath, that he verily believes that neither the Emperor of All the Russias, nor any of his subjects or others inhabiting within any of his countries, territories, or dominions, their factors or agents, nor any others enemies of the Crown of Great Britain and Ireland, had at the time of the seizure thereof, *or now have*, directly or indirectly, any right, title, or interest in or to the said ship or freight, but that the same were at the time of the seizure thereof, and still are, and when restored will still be, the property of the [claimants] only, neutral subjects. . . ."

The forms of standing interrogatory, to which I have already referred, were maintained until the reign of the present King of Great Britain and Ireland.

In the forms of the existing Rules of the Prize Court, if an order for release of captured goods is made, they are expressed to be released to the claimants for the use of the owners thereof. If in the present case the cargo of cocoa or its proceeds were ordered to be released to the claimants without qualification, the release would in fact be to the trustees for enemy merchants. And if the release was made to the claimants for the use of the owners of the goods, it would be for the use of enemy merchants likewise.

I may add that this is not a claim for damages or compensation for wrongful seizure or detention. It is a claim to the goods themselves. The hands of the captors have remained on the goods and their proceeds from the time when the underwriters obtained and claimed the ownership. No fresh act of seizure was necessary.

It was suggested in argument that my judgment in *The Gothland* (2) (April 3, 1916) supported the contention of the present claimants. That was a wholly different case. The insurance company in that case, when they paid the claim for total loss, had full knowledge of the seizure of the goods as enemy property, and any

(1) (1856) Spinks, P. C. 336, 339, 340 ; 2 Eng. P. C. 560, 563.

(2) See note on p. 239, post.

rights of ownership which passed to them were subject to the rights already acquired by the captors by the seizure.

In the case now before me my conclusions of fact are—(1.) that the real claimants are the German underwriters and not the neutral shippers ; (2.) that the owners of the goods at the time of the claim were and now are the German underwriters ; (3.) that if by the order of the Court the goods or the proceeds were released to the nominal claimants, the claimants would hold the goods or proceeds as trustees of and for the benefit of the German underwriters.

Upon these facts my judgment is that the claim is disallowed, and that the proceeds of the goods now in Court must, as enemy property, be condemned to the Crown as good and lawful prize in the Crown's rights to the droits and perquisites of admiralty.

The claimants put forward the claim at the request and on behalf of the German underwriters on the terms that the latter should bear the costs.

I therefore order that the claim be disallowed with costs against the claimants.

Leave to admit an appeal within one month on payment of security for costs 300*l*.

Solicitor for the Procurator-General : *The Treasury Solicitor*.

Solicitors for claimants : *Stokes & Stokes*.

NOTE.—In the case of THE GOTHLAND [1915, No. 479] the St. Paul Fire and Marine Insurance Company of Richmond, U.S.A., before the outbreak of war had insured, against sea risks only, a cargo of 24,000 bushels of wheat shipped by the American Grain Company on board the Belgian steamship *Gothland* at Montreal and consigned to Rotterdam to German merchants to whom the property in the goods passed on shipment.

On June 23, 1914, the *Gothland* stranded off the Scillies, whereby she and her cargo were greatly damaged, and she put into Southampton for repairs. On the outbreak of the war with Germany she was still lying in dock, and on February 11, 1915, the cargo, which had been discharged into warehouses in the port, was seized as prize. The insurance company subsequently paid under the policy as on a constructive total loss, and, having taken an assignment of all the rights and remedies of the assured, claimed the release of the proceeds of the cargo which had been sold.

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1916. April 3. THE PRESIDENT (SIR SAMUEL EVANS) in the course of his judgment said :

"There is no precedent for such a claim as has been put forward on behalf of this insurance company, and I think it would be a sad day for the Prize Court if people who are in the position of underwriters, and under contractual obligations to the legal owners of the property, could come and ask the Court to investigate what the position was in regard to their assured and themselves as underwriters. In this case the insurance company had not insured the goods for anything except ordinary sea risks. They had not insured the goods for any war risks. The sea risks were encountered some time before the vessel went to Southampton and a long time before the goods were seized. Nothing was done by the insurance company by way of an attempt to put themselves into the position of the owners of the goods after the sea risk was encountered, and, according to their case here, after the position became one of constructive total loss. Some two or three months after the seizure the insurance company paid under their policy, and on May 5, 1915, took from the assured the documents which have been put in, which purport to be assignments of all the rights and remedies of the assured. I think it is possible that some steps might have been taken by the insurance company, if they had seen fit before the seizure by the Crown, which would have placed them in the position of legal owners of the property. Nothing of that kind was done. The payment was only made after the seizure, and I am not called upon to determine, when we are merely testing ownership of the property at the time of seizure, what the relations of the parties at that time might be, or what the effect of that contractual relationship might be hereafter in months to come when they settled their affairs. It is enough for me to say that it is undisputed that the owners in fact of the goods—apart from any of these legal obligations which might have arisen in respect of the goods—were the German merchants, and therefore, at the date of seizure, they were the proper subject-matter for confiscation, and I order the condemnation of the 24,000 bushels of wheat as enemy property in favour of the Crown as *droits of admiralty*."

E. C. T.

[IN THE COURT OF APPEAL.]

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Admiralty—Ship—Forfeiture—British Company controlled in Germany—Principal Place of Business of Company—Position of British Shareholders—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 9, 76—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 51.

By s. 1 of the Merchant Shipping Act, 1894, “a ship shall not be deemed to be a British ship unless owned wholly by . . . (d) bodies corporate established under and subject to the laws of some part of Her Majesty’s dominions, and having their principal place of business in those dominions.”

A ship registered as a British ship was owned by a company registered as a British company under the Companies Acts. Doubts having arisen as to the title of the ship to be registered as a British ship, the Commissioners of Customs and Excise, pursuant to the provisions of s. 51 of the Merchant Shipping Act, 1906, directed the plaintiff, the registrar of shipping at the ship’s port of registry, to require evidence to be given to his satisfaction that the ship was entitled to be so registered. The evidence adduced established that the affairs of the company from the time the ship was bought and put upon the register were directed from Hamburg by the chairman of the board of directors, a naturalized British subject of German origin, who held the majority of the shares and resided at Hamburg both before and after the outbreak of war between Great Britain and Germany. Accordingly, proceedings for forfeiture were instituted in accordance with the provisions of s. 76 of the Merchant Shipping Act, 1894 :—

Held, that the principal place of business of the company was not within His Majesty’s dominions, and that the ship, therefore, was forfeit to the Crown.

Decision of Bargrave Deane J. (ante, p. 117) affirmed.

Motion for relief on behalf of British shareholders in the company rejected.

APPEAL from a decision of Bargrave Deane J., reported ante, p. 117.

The plaintiff, Walter Charles Searley, was the registrar of shipping at the port of King’s Lynn. The defendants, the owners of the steamship *Polzeath*, were the Lynn and Hamburg Steamship Company, Limited, a company incorporated in 1888 and registered as a British company under the Companies Acts, and the vessel was registered as a British ship at King’s Lynn in March, 1911. In

C. A. October, 1914, the Commissioners of Customs and Excise, being in
1916 doubt as to the title of the *Polzeath*, then known as the *Walter*
THE *Dammeyer*, to be registered as a British ship, directed the plaintiff,
POLZEATH. pursuant to the provisions of s. 51 of the Merchant Shipping Act,
1906, to require evidence to be given to his satisfaction, within thirty
days, that the vessel was entitled to be so registered. No evidence
satisfactory to the plaintiff was given, and an action was instituted
for the forfeiture of the ship to the Crown. Meanwhile the vessel
had been requisitioned by the Lords Commissioners of the Admiralty
and her name changed to the *Polzeath*.

Bargrave Deane J. ruled (with the consent of counsel for the defendants) that no further evidence was admissible, and came to the conclusion on the evidence supplied to the plaintiff that the chairman of the company, a naturalized British subject of German origin residing in Hamburg, who held the majority of the shares, was the life and driving force of the company; that the shareholders and directors in England were puppets pulled by his strings; and that the business of the company was controlled and managed in Hamburg. He held, therefore, that the requirements of s. 1 of the Merchant Shipping Act, 1894, had not been satisfied, and, in accordance with the provisions of s. 76, declared the vessel forfeit to His Majesty (1), and gave liberty to apply in respect of the British-owned shares.

On June 8, 1916, counsel on behalf of the British shareholders applied for relief as regards their interest. His Lordship took the view that these shareholders had power, if they had liked to exercise it, when on the outbreak of war they found that the ship was practically in German hands, to go to some Court to have the ship's register altered and to obtain powers to administer the affairs of the company. He therefore rejected the motion with costs.

The defendant company and the British shareholders appealed.

MacKinnon, K.C., and *C. R. Dunlop*, for the appellant company.
Sir Frederick Smith, A.-G., *Leslie Scott, K.C.*, and *J. Wylie*, for the respondent.

The same arguments were adduced as in the Court below. In

(1) The material sections of the Merchant Shipping Acts of 1894 and 1906 are set out in the judgment of Swinfen Eady L.J.

addition to the cases there cited, counsel for the respondent referred to *The Annandale* (1) and Lord Parker's dictum in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)* (2) that "such a company (i.e., one incorporated in the United Kingdom) may assume an enemy character if its agents or the persons in de facto control of its affairs are in an enemy country."

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SWINFEN EADY L.J. The question raised by this appeal is whether the ship that was formerly called the *Walter Dammeyer*, but since she has been chartered by the British Government has been called the *Polzeath*, was rightly pronounced by the judgment now under appeal to have been forfeited.

The proceedings have been taken under the Merchant Shipping Acts to sustain a cause of forfeiture of the ship to the Crown. It is provided by the Merchant Shipping Act, 1906, s. 51, sub-s. 1, that "Where it appears to the Commissioners of Customs that there is any doubt as to the title of any ship registered as a British ship to be so registered, they may direct the registrar of the port of registry of the ship to require evidence to be given to his satisfaction that the ship is entitled to be registered as a British ship." And then by sub-s. 2: "If within such time, not less than thirty days, as the Commissioners fix, satisfactory evidence of the title of the ship to be registered is not so given, the ship shall be subject to forfeiture under Part I. of the principal Act" (the Merchant Shipping Act, 1894). Part I. of the principal Act provides by s. 76 that "Where any ship has either wholly or as to any share therein become subject to forfeiture under this part of this Act"—then there are provisions for seizing the ship and bringing it for adjudication before the High Court of Justice in England—"and the Court may thereupon adjudge the ship with her tackle, apparel, and furniture to be forfeited to Her Majesty, and make such order in the case as to the Court seems just, and may award to the officer bringing in the ship for adjudication such portion of the proceeds of the sale of the ship, or any share therein, as the Court think fit."

Now the qualification for owning British ships is contained in s. 1 of the Merchant Shipping Act, 1894, which provides that "A ship shall not be deemed to be a British ship unless owned wholly by

(1) (1877) 2 P. D. 218.

(2) [1916] 2 A. C. 307, 345.

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persons of the following description (in this Act referred to as persons qualified to be owners of British ships)." Then clause (d) of that section extends to "bodies corporate, established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions." Sect. 9, which provides for the declaration of ownership that has to be made on the registry of a British ship, provides that "A person shall not be entitled to be registered as owner of a ship or of a share therein until he, or in the case of a corporation the person authorised by this Act to make declarations on behalf of the corporation, has made and signed a declaration of ownership, referring to the ship as described in the certificate of the surveyor, and containing the following particulars"; and then sub-s. (i.): "A statement of his qualifications to own a British ship, or in the case of a corporation, of such circumstances of the constitution and business thereof as prove it to be qualified to own a British ship." I refer to sub-s. (i.) of s. 9 as aiding the construction of clause (d) of s. 1, which provides that the body corporate must have its principal place of business in Her Majesty's dominions.

It is claimed that in the present case the company's ship was not properly registered in the name of the defendant company, which has not, as is alleged, its principal place of business in His Majesty's dominions. The company is registered under the English Companies Acts, and at one time its principal place of business was in England. The case made against the company is that at all material times its principal place of business has been not in England but in Hamburg. In considering what is the principal place of business of a company, assistance is derived from the case of *Palmer v. Caledonian Ry. Co.* (1) There the words that were being considered were "the principal office" or "one of the principal offices" of a railway company. Lord Esher, then Master of the Rolls, said: "I should have thought without any authority that the principal office of the company must be the place at which the business of the company is controlled and managed. The only office that answers this description is the company's office at Glasgow. No part of the business of the company is controlled or managed, in the sense that it is independently controlled or managed, at

(1) [1892] 1 Q. B. 823, 827, 829.

Carlisle." The point there was whether service upon the company at Carlisle was a good service upon the company at one of their principal offices. Lopes L.J. said: "What I understand by principal office is that office where the general superintendence and management of the business of the railway is carried on" And so here, in considering what is the principal place of business of the company, one has to consider the centre from which instructions are given, and from which control is exercised on behalf of the company over the employees of and the business of the company, and where control is exercised, and the centre from which the company is managed without any further control except such control as every company or the directors of a company are liable to by the larger body which they represent, the shareholders of the company in general meeting.

To apply these considerations to the facts of this case, it appears that the Lynn and Hamburg Steamship Company, Limited, being an English limited company, has an issued capital of 1610 shares. Of those shares one person, Hermann Dammeyer, owns more than half, so that, as the voting power is a vote per share, each share carrying a vote, he controls the company in the sense that in general meeting he could carry by a majority of votes any proposition, and no vote adverse to his view could be carried in general meeting. His wife holds six shares, and there is another gentleman, Mr. Carl Breithan, a German, also living in Hamburg, who holds fifty shares. Thus Dammeyer, his wife, and Breithan hold 901 shares out of the total of 1610. Those three persons are German subjects. They hold an absolute majority of the shares, and in that way hold the control of the company.

There are, or were until the outbreak of the war, four directors, Mr. Dammeyer and Mr. Breithan, the two German gentlemen, and Mr. Henry Ruffer and Mr. G. A. Meves, both of whom reside in England. The German director, Dammeyer, is chairman of the board, and as such, according to the constitution of the company, has a casting vote in case of equality of votes on the board. If, therefore, the two German directors were to take one view at a board meeting and the two English directors another, then Mr. Dammeyer's view, by reason of his being chairman and having a casting vote, would prevail.

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Until some six or seven years before the year 1914—the year in which the answers are given to certain questions—Mr. Dammeyer was in England, but at that time, which would make it either the year 1907 or 1908, Mr. Dammeyer removed to Germany and took up his residence in Hamburg. The secretary of the company, Mr. Savage, also went with Mr. Dammeyer to Hamburg. He has remained there ever since as the paid secretary of the company. Upon the outbreak of the war it appears that Mr. Savage, who is English, was interned in Germany at Ruhleben, and remains interned. Mr. Dammeyer apparently is treated in Germany as a German subject, notwithstanding his English naturalization, and is at large in Hamburg.

In order to see the way in which and the centre from which the company has hitherto been managed, the first source of information to which one would turn in the ordinary course would be the minute-book, which contains the record of the meetings of the board and what was done at them. But the minute-book is not forthcoming. It would be kept by the secretary, and we are told it is in Germany.

Questions having arisen—perhaps I will say suspicions having arisen—with regard to this vessel, at the end of October, 1914, the Commissioners of Customs and Excise directed the registrar of shipping at the port of King's Lynn to make inquiries with regard to her pursuant to s. 51 of the Merchant Shipping Act, 1906, and on November 2 the acting collector at King's Lynn, Mr. Searley, as an officer of Customs, wrote to the company as follows: "I have been directed by the Commissioners of Customs and Excise to hold an inquiry under the above Act"—the letter is headed "Merchant Shipping Act, 1906, section 51"—"as to the title of the steamer *Walter Dammeyer* to be registered as a British ship. You are therefore requested to produce evidence in order to prove to the satisfaction of the Commissioners that the above-named vessel is so entitled to be registered. The evidence in answer hereto, which should be in affidavit form, should embody, in addition to any other statement you may desire to make,"—and then there are various matters which are set out in the affidavit—statements as to six matters that are mentioned in the affidavit.

It will be observed that this request refers to s. 51 of the Act. It requests the company to produce evidence that the vessel is entitled

to be registered as a British ship, and whatever evidence they produce is entirely open to them ; they may produce as evidence what they please ; but in addition, to assist them, specific questions are asked with regard to certain details of the evidence. They are asked the names and addresses of the directors, and where they reside. Then they are asked : “ (3.) Has an attempt been made to charter the ship since the outbreak of war ? If so, who gave instructions to do so ? ” Then : “ (4.) Where is the chairman of the company and the other German director ? Have they communicated in any way with the other directors since the outbreak of war ? (5.) Where is the secretary of the company ? Is he taking any part in the business ? (6.) Is the business of the company controlled, and the management of the business conducted, at meetings of the directors held at the registered office of the company at King’s Lynn ? Who have attended the meetings since the outbreak of war ? ”

That letter is answered by Mr. Tassell, the manager of the company. He gives the information which I have referred to with regard to the directors. As to Mr. Hermann Dammeyer, he says : “ This director was to my knowledge a naturalized British subject during the whole of my acquaintance with him, extending for twenty-four years. He resided in London until six or seven years ago,”—it is in November, 1914, that this information is given—“ when he went to live at Hamburg, and so far as I am aware is still a British subject.” Then he says that Meves, a director, is a British subject, that Henry Ruffer is a naturalized British subject of Swiss origin born in France, and that the fourth director, Carl Breithan, is a German. Those are the particulars of the two German and the two English directors. Then Mr. Tassell says : “ I am the manager of the company, and reside at King’s Lynn, and I am a British subject. The secretary of the company, Wallis Savage, is a British-born subject, and until Mr. Hermann Dammeyer left London resided also in London, but left with Mr. Dammeyer, and now resides at Hamburg.” He then goes on to say that the company is managed by him subject to the control of the directors. Then No. 3 is an important question : “ Has an attempt been made to charter the ship since the outbreak of war ? ” He says, “ Since the outbreak of war no attempt has been made to charter the steamship *Walter Dammeyer*, although it was originally the intention of the London

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C. A. directors and myself to engage the vessel in the home trade, if
 1916 profitable employment could be obtained, but Mr. Dammeyer, the
 THE director above referred to, communicated through a Mr. Sinnema,
 POLZEATH. of Amsterdam, with me, and intimated that he did not approve
 Swinfen Eady of the chartering of the steamer for this purpose, but wished
 L.J. the steamer to remain in dock"; and then he exhibits the
 correspondence.

The Crown rely strongly upon this correspondence as showing what, without taking it at any fixed date, the real position of affairs is. Counsel for the appellants submitted that it should be taken roughly as since the war. Since the outbreak of war have the control of the company and the principal place of business of the company been in Hamburg? In my opinion we cannot look only to what has happened since the war. We must consider what the position was before the war. But for the moment, looking only to what has happened since the war, what is the position with regard to the chartering of this ship? The two directors being in Hamburg, and the minute-book being in Hamburg, what took place on the outbreak of war was that in an informal manner, and in an irregular manner according to the constitution of the company, the two directors in England called to their aid two of the largest shareholders in England, and those four persons met from time to time, and with the assistance of Mr. Tassell, the manager, purported to exercise in England some of the powers of the company. The two shareholders had never been elected on the board, and it is not suggested that they were qualified to act as directors. It is not suggested that this irregular meeting, purporting to assume to itself the functions of a board, was a regular or legal method of carrying on the business of the company in accordance with its constitution, but it was an honest attempt to do the best they could under the circumstances. As I have said, the minute-book is not forthcoming; the minute-book is in Hamburg; but they started a memorandum book in which they entered particulars of what this little committee did. One of the first things that they resolved upon was that this ship, which at the moment was idle, should be chartered or worked at a profit, and on August 17 they enter a memorandum of what they determine to do; they enter it as if it were a resolution of the board meeting: "It was further resolved that the marine and war risk insurance be

covered over the period to be arranged if the steamer can be chartered or worked at a fair profit to the company." Then it appears that on August 26 Mr. Tassell wrote to Mr. Sinnema at Amsterdam—Mr. Sinnema being the medium of communication between London and Hamburg—and he passed the matter on to the chairman of the company in Hamburg. Mr. Tassell communicated in that way the decision at which this committee had arrived on August 17. He said: "If you are communicating with Mr. Dammeyer, please inform him that everything is in good order"; and then the letter contains this statement: "If we can cover her marine insurance at Lloyd's later on at a reasonable rate, also the war insurance, and can see a chance of running her in the coasting trade at a profit, we propose to do so." As soon as that was communicated to the chairman of the company, the authority of the chairman was immediately put in force, and the next thing was a telegram of September 1. It was apparently a telegram sent from Hamburg to Amsterdam, and from Amsterdam to London. Sinnema on September 1 telegraphs: "Dammeyer telegraphs not to charter steamer. Expect letter. Sinnema." The next day there is a letter. I suppose it is sent by the chairman, Dammeyer, to Mr. Tassell, but obviously through Amsterdam. On September 2 the chairman says: "Referring to my yesterday's communication kindly put forward to you by Mr. Sinnema, I wish to tell you once more that I will not run any risk with the steamer in the way of a charter or employing the vessel in any way during present hostilities. To cover all the risks seems to me simply impossible, and anyhow, if covered not safe enough for us." The chairman was manifestly exercising the control from Hamburg over the affairs of the company. On September 4 Sinnema wrote further: "Mr. Dammeyer is of opinion that the employment of the steamer during the war is subject to too much risk, and without mentioning that the insurers (Lloyd's) under circumstances could not be safe enough for the insurance accounts, the high war premiums will make a remunerating business impossible. Mr. D. therefore does *not* agree previously the chartering of the steamer for coasting trade, and begs to let the steamer in dock"—that is to say, the steamer is to remain in dock—"awaiting the further development." On September 8 there is a letter from Mr. Tassell in answer to this: "I have this morning received your letter of

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C. A. 4th instant" (from Sinnema). "Will you kindly inform Mr.
1916 Dammeyer that his instructions with reference to the steamer shall
THE be carried out, and that we will keep her in dock during the present
POLZEATH. hostilities, unless requisitioned by the Government, which is not
Swinfen Eady probable." Therefore, notwithstanding the resolution of August 17
L.J. of the informal committee in London, it is overridden by Mr.
Dammeyer, and for the rest of that year nothing further is heard
about chartering or working the vessel. Mr. Tassell was as good as
his word, and the chairman's instructions with regard to the steamer
were carried out.

The next question is with reference to the financial control. Having regard to the letter of September 8, 1914, and to Mr. Tassell's answers, it seems to me to be manifest that the company has three banking accounts, Nos. 1, 2, and 3. Nos. 2 and 3 were apparently only fed from No. 1 account. They were operated upon by the manager of the company for local payments, and they were small matters, apparently, which were left in the control of the manager. The principal account of the company is the No. 1. Having regard to what is stated, I think it cannot be doubted that up to the outbreak of war the cheques were all signed by two directors in Hamburg; but whatever cheques were signed they were all countersigned by the secretary, who was resident in Hamburg, acting under the chairman's instructions. Therefore the financial control was in Hamburg. True it is that after the outbreak of war, as the banking account is here, an arrangement had to be made with the bank, and an arrangement was made under which cheques drawn on No. 1 account and signed by two directors, with Mr. Tassell countersigning, were honoured. But that was only in consequence of a special arrangement made after the outbreak of war, and was not the case up to the commencement of the war; and I think upon the evidence it cannot be doubted that the real position was that all the financial control was exercised in Hamburg, where the secretary lived and where all the cheques were countersigned.

Then there was a question with regard to the insurance of the ship, and so late as October 14, 1914, instructions are being given through Mr. Sinnema by the chairman in Hamburg with regard to insurance. He is directing matters. On that date Sinnema writes: "To-day I have to write you at the request of Mr. Dammeyer"; and then,

in inverted commas, is set out Dammeyer's instructions: "As regards the steamer, which as you know has to remain in dock until my further orders, I wish to see her covered against war risk. Seeing this risk being a harbour risk only, the rate is bound to be very moderate, and I should be glad to hear from you the rate for three and six months on, say, 13,000%. On receipt of your reply I will give you instructions"—I, the chairman of the company. It cannot be doubted, when regard is had to the facts of the case, that both before and after the war, and at all the material dates, the control and management of this company were in Hamburg.

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It was suggested that perhaps at one time the questions that were addressed by the officer of Customs did not point to the case that is now raised; but that cannot be maintained, because the second request for information is in this form: "Is not Mr. Hermann Dammeyer the managing director of the company, and has not he had virtual control of the vessel, both prior to the outbreak of war and subsequently?" And: "How long has the secretary resided in Hamburg?" Those questions point directly to the virtual control and management, and ask whether both before and since the war they have not been in Hamburg. Mr. Tassell answered that, no doubt, to the best of his ability. He says: "Mr. Dammeyer is chairman of the directors of the company, not managing director. The company has never to my knowledge ever had a managing director. The manager at King's Lynn has always practically had a free hand as to chartering steamers, surveys, repairs, freights, arranging officers and crews, &c., advising Mr. Dammeyer as chairman of directors what has been done." That is to say, he acts under the direction of the chairman at Hamburg. To the question whether Dammeyer had not had virtual control both before and after the war, the further answer is: "Mr. Dammeyer has not had virtual control since outbreak of war"—since.

Then a further question was put in regard to the meeting of the directors; and reading carefully what Mr. Tassell says—I have no doubt that he did the best he could for his company—I think it is manifest that until the outbreak of war, except for one meeting of the board yearly in London, all the meetings of the board were held in Hamburg. He is asked where they are held, the question being: "Is the business of the company controlled and the management

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1916 registered office? Who have attended the meetings?" He
answers it in this way: "The business of the company is controlled
at meetings of the directors, one of which, until the outbreak of war,
was held yearly in London." But where were all the other meetings
held? The obvious inference is, at Hamburg. Then he says:
"Since then all directors' meetings have been held in London"—
that is, since the outbreak of war—"not at the registered offices of
the company at King's Lynn. These meetings have been attended
by the two English directors above referred to, by me as manager
of the company, and by two of the largest English shareholders,
Mr. Vasmer and Mr. Bilton."

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Under those circumstances I think it is clear to demonstration that both before and since the war the principal place of business of this company has been Hamburg; and, that being so, I am of opinion that the conclusion of fact at which the judge below arrived was right, and that the evidence which the Court has to consider is not satisfactory of the title of the ship to be registered as a British ship. I think it is clear that the principal place of business of the defendant company is not within the British dominions, but in Hamburg. It is true that many of its operations are carried on in England. In addition to owning the ship, it appears to have carried on a considerable business as a trader both in coal and in sugar; and it may well be as regards the purchase and shipment of coal that the details were arranged in England; with regard to the purchase and the export of sugar from Hamburg, probably all the arrangements were made in Hamburg. One has to consider upon the evidence where is the principal place of business. I am satisfied that the principal place of business is not within His Majesty's dominions. The ship, therefore, is not entitled to be registered as a British ship, and the judgment below condemning the ship to forfeiture was right and must stand.

PHILLIMORE L.J. I agree that this appeal must fail. On March 8, 1911, the appellant company was registered with the collector of Customs at King's Lynn as the owner of a ship intended to be a British ship. The appellant company, being a body corporate, in order to entitle itself to own a British ship, had to be one estab-

lished under and subject to the laws of some part of His Majesty's dominions and having its principal place of business in those dominions. And having regard to s. 9, which establishes the procedure by which a ship is to get upon the register, or by which an owner is to get upon the register in respect of a ship, it appears that the corporation must at the time it seeks the registration, and to enable it to get the registration, have the same conditions—I use the expression of the section—the same “ circumstances of the constitution and business as prove it to be qualified to own a British ship ”—that is, under s. 1 of the Act of 1894. At that time the constitution of the company was as stated by Swinfen Eady L.J. The majority of the shares were held by Mr. Dammeyer. Other shares were held by other Germans. One of the other directors and shareholders was a German resident at Hamburg; Mr. Dammeyer had moved to Hamburg some years before and had taken the secretary with him. From the time that Mr. Dammeyer had moved to Hamburg, which was before the time the English ship was purchased and registered, only one meeting of directors had been held in England. The general meeting of the company had also been held in England, but it is evident that there were other meetings of directors, and that, as they were not held in England, they must have been held at Hamburg. On those facts and other facts it is, to my mind, plain that until the outbreak of war the principal place of business of this company was not in His Majesty's dominions, but was at Hamburg.

As regards the state of things since the war there is, I think, more difficulty, and the appellants have fastened upon that point and have said that the duty of the Court is not to inquire whether the ship at some previous stage was entitled to be registered, using the words of s. 51 of the Merchant Shipping Act, 1906, but whether she had a title to be registered at the time when the inquiry was made. I think it right to construe s. 51 as meaning that the inquiry is as to the title of the ship *to be* on the register, not *to have been* put upon the register—that the word “ register ” is not to be considered as a verb of motion denoting the act of putting on the register, but a static verb, remaining or being upon the register, and that it is right to say that the inquiry is whether there is a title of the ship to be on the register. That expresses, I think, exactly what I mean.

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That being so, I will, for the purposes of this case only, assume the argument of the appellants that the fact that at some previous stage the ship was not entitled to be upon the register is immaterial—that is immaterial for this particular form of procedure, though it might be possible for the Crown, if they could establish a case under s. 69 of the Merchant Shipping Act of 1894, to proceed for forfeiture under that section, upon the supposition that the ruling in the case of *The Annandale* (1) applies to the later Act of 1906, a point upon which I desire to express no opinion.

Assuming, however, all that in favour of the appellants, I cannot get over the difficulty that, to be upon the register, the ship must have been lawfully put there; and, in my view, one must not neglect the initial stage when she was put upon the register for the first time, and at that time the company was not qualified to own a British ship or to be put upon the register as owning a British ship, because the circumstances were the same as they were from that time forward until the outbreak of war, and those circumstances were such that the company had its principal place of business at Hamburg. That, in my judgment, is enough to decide this case, and I am personally rather glad to be able to put it upon that ground, but I do not dissent from the view of Swinfen Eady L.J. that upon the whole, though the case is much more arguable since the war than it was before the war, the principal place of business, which was at Hamburg, has not been moved from Hamburg since the war, and therefore that the corporation still has de facto, if not de jure, its principal place of business at Hamburg.

I cannot part from this case, however, without dealing with one other matter. It was contended by the Crown in the Court below that the only evidence admissible upon this inquiry was the information supplied to the registrar. It was so ruled by the judge, but it was ruled with the consent of counsel for the company, and no point has been made on this appeal by counsel for the company that evidence was improperly excluded which he desired to take. That being the case, this Court is not in a position to decide whether or not that ruling of the learned judge was right, and I do not intend to express any opinion upon it, except that I think it is a matter which would on a proper occasion require very serious consideration.

BANKES L.J. I agree. The only question which arises in this appeal for decision is, as it appears to me, a question of fact. I think that the materials upon which the Court is asked to decide, or rather was in the Court below asked to decide, are very insufficient and unsatisfactory, and the amount of information which is given as to the way in which this company has carried on its business is very scanty. But neither party sought to adduce any other evidence in the Court below, and both parties are content in this Court that the decision should be given upon materials which were in the Court below.

Under those circumstances, dealing with those materials, the inference that I draw is that before the war the principal place of business of this company was in Germany. Since the war the inference I draw is that under stress of circumstances the English directors and shareholders have made the best makeshift arrangements they can to do what they consider to be best in their interests, but without any transfer of the principal place of business to this country at all. Under those circumstances it appears to me that the proper conclusion upon these materials as a matter of fact is, that the principal place of business of this company has been, and is, without His Majesty's dominions, and that is sufficient for the decision of this appeal.

But two very important questions of law have been touched upon, and upon those no decision is arrived at by this Court. I only mention them in order to avoid the conclusion at any future time that these questions have been considered and decided. They are these : first, whether upon an inquiry under s. 51 of the Merchant Shipping Act of 1906 it is sufficient to give evidence that at some period in the past history of the vessel the provisions of the statute have not been complied with ; and, secondly, whether or not upon an inquiry, after the matter has been referred to the Court, the parties are limited to the evidence which was supplied to the Commissioners. In my opinion both these matters are open for discussion at any future time, and the decision in this case should be treated as a decision upon the facts only.

Appeal dismissed.

Raeburn, for the British shareholders in the appellant company. The vessel should be appraised or sold and a sum proportionate to

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their holdings should be paid to the British shareholders. It is not their fault that the chairman transferred the control of the company to Hamburg. He held the majority of the shares, and the minority shareholders were helpless in the matter. The Court has power to make such order as may seem just under s. 76, sub-s. 1 (c), of the Merchant Shipping Act, 1894.

SWINFEN EADY L.J. In my opinion the British shareholders are not entitled to intervene. It is suggested that the ship should be appraised, and that payment should be made to the British shareholders in proportion to their holdings. The Court has no such power; it cannot administer the affairs of the company. If any hardship is caused to innocent shareholders by the declaration of forfeiture their position is that they can only appeal to the merciful consideration of the Crown. The order giving them leave to intervene must be discharged.

PHILLIMORE L.J. and BANKES L.J. concurred.

Order discharged.

Solicitors for appellant : *Holman, Birdwood & Co.*

Solicitors for interveners : *Burgess, Cosens & Co.*

Solicitor for respondent : *Solicitor for Customs and Excise.*

E. C. T.

[IN THE COURT OF APPEAL.]

THE THORSA.

[1915 T. 486.]

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July 12.

Ship—Seaworthiness—Ship fit to carry Cargo—Improper Stowage—Bill of Lading—Excepted Perils.

Cases of chocolate laden on board the defendants' steamship and consigned to the plaintiffs were delivered in a deteriorated condition owing to the cases having been stowed in the same hold as a number of gorgonzola cheeses. The defendants relied on an exception in the bill of lading relieving them from liability for negligent stowage. The plaintiffs replied that the defendants could not rely on any of the exception clauses inasmuch as when the chocolate was loaded and/or the voyage commenced the ship "was not seaworthy or fit for carrying the chocolate in that the chocolate was carried where it was liable to become, and did become, tainted by cheese":—

Held, affirming the decision of Bargrave Deane J., that the ship was not unseaworthy; that the damage was caused by improper stowage; and that the defendants were protected by the exception in the bill of lading.

APPEAL from a decision of Bargrave Deane J.

Under a bill of lading dated December 8, 1914, 1838 cases of chocolate consigned to the plaintiffs, the Nestlé and Anglo-Swiss Condensed Milk Company, were shipped at Genoa in good order and condition on board the defendants' steamship *Thorsa* for carriage to London. The plaintiffs alleged that in breach of their duty to deliver the chocolate in the like good order and condition the defendants delivered it tainted and deteriorated by taint from gorgonzola cheese which was stowed in the same hold. By their defence the defendants denied the breach of duty or that the chocolate was delivered in a tainted condition, and further relied on, *inter alia*, an exception in the bill of lading relieving them from liability for "all loss and damage arising from any act, neglect, or default whatsoever . . . of the officers, engineers, crew, stevedores, servants, or agents of the owners in the management loading or stowing . . . of the ship . . . or otherwise, and the owners being in no way liable for any consequences of the causes before

C. A. mentioned." The plaintiffs in their reply pleaded that the defen-
 1916 dants were not entitled to rely on the exception clauses of the bill
 THE of lading "by reason of the fact that the *Thorsa* when the chocolate
 THORSA. was loaded and/or the voyage commenced was not seaworthy or
 fit for carrying the chocolate in that the chocolate was carried
 where it was liable to become and did become tainted by cheese."

A number of witnesses were called at the trial on behalf of the plaintiffs, and at the close of their case counsel for the defendants submitted that the plaintiffs had not made out any case. Bargrave Deane J. upheld this contention and gave judgment for the defendants on the ground that the damage was caused by bad stowage which did not render the ship unseaworthy, and in respect of which the defendants were protected under the bill of lading.

The plaintiffs appealed.

MacKinnon, K.C., and *C. R. Dunlop*, for the appellants. The *Thorsa* was unseaworthy in the sense that she was unfit to carry this particular cargo: see *Kopitoff v. Wilson* (1), *Tattersall v. National Steamship Co.* (2), and the judgment of Scrutton J. in *Ingram & Royle, Ltd. v. Services Maritimes du Tréport* (3), which was reversed by the Court of Appeal, but on another point. It follows from these cases that if the cause which may in the ordinary course occasion damage to the cargo during the voyage exists at the time the ship sails, she is unseaworthy; and it is immaterial whether the defect is in the structure of the ship or in the hold due to the presence of other noxious cargo. The exceptions in the bill of lading can only relieve the shipowners provided the ship is seaworthy at the commencement of the voyage: *The Glenfruin*. (4)

[PHILLIMORE L.J. referred to *Cohn v. Davidson*. (5)]

On the evidence as it stands judgment ought not to have been entered for the defendants; they have not discharged the burden which was upon them of proving that the negligence which occasioned the damage was that of one or other of the persons whose negligence was excepted by the bill of lading. [*Towse v. Henderson* (6) and *The Carron Park* (7) were also referred to.]

(1) (1876) 1 Q. B. D. 377.

(4) (1885) 10 P. D. 103.

(2) (1884) 12 Q. B. D. 297.

(5) (1877) 2 Q. B. D. 455.

(3) [1913] 1 K. B. 538.

(6) (1850) 4 Ex. 890.

(7) (1890) 15 P. D. 203.

Bateson, K.C. (A. Neilson with him), for the respondents, was called on to argue whether the defendants had discharged the burden of proving that it was some servant of the shipowners who was responsible for the negligent stowage. He was stopped.

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SWINFEN EADY L.J. In this case the owners of cargo on board the steamship *Thorsa* sued the shipowners for damage to cargo. The learned judge at the trial found that the damage to the cargo had resulted from bad stowage and nothing else, and that the shipowners were protected by the exception in the bill of lading, and he gave judgment for the defendants. It is against that judgment that the plaintiffs now appeal.

The plaintiffs were the owners of 1838 cases of chocolate that were shipped on board the *Thorsa* at Genoa for London. The bill of lading is dated December 8, 1914. The case for the plaintiffs was that, on the arrival of the goods at the port of discharge and on the consignees receiving the goods, they were so tainted and affected by the smell of cheese as to be damaged and almost, if not quite, unmerchantable. The extent of the damage is immaterial to this question; there would have been a reference to ascertain the damage if the claim had succeeded, so the amount of it is not in question here, and that some damage was occasioned is not in dispute. The question is whether the shipowners can rely upon the provisions of the bill of lading and so be absolved from liability for the damage.

The ship carried in addition to the chocolate a quantity of gorgonzola cheese and a number of turkeys. Apparently she had exceptionally bad weather to encounter, and the consequence was that the hatches were kept on during the voyage. There was no opportunity of obtaining the additional ventilation which removal of the hatches would have afforded, and when the cargo arrived in London there was an offensive smell given off from it. I think it is quite clear from the evidence of the lighterman in control of the barges discharging the ship that there was a very offensive smell caused particularly by the turkeys, which were in a state of decomposition; but it is also established, or it must be taken I think on the evidence of the plaintiffs to be established, that the chocolate was affected by the cheese which was carried on the ship. It was

C. A. suggested that it was the cardboard boxes in which the chocolate
1916 was contained and not the chocolate itself which was affected, but I
think the fair result of the evidence given on behalf of the plaintiffs
THE is that the chocolate was seriously tainted by reason of its proximity
THORSA. to the gorgonzola cheese and that it had imbibed the taint from
Swinfen Eady the cheese. That fact the plaintiffs established.
L.J.

But the plaintiffs were not content with merely proving the damaged condition in which the cargo arrived; they adduced evidence to show what had occasioned the damage, and, in my opinion, it is established by the plaintiffs' evidence that what occasioned the damage was the improper stowage. The exact details of the stowage are not proved. A stowage plan was produced to which both parties referred, and which, although not formally proved, was referred to in turn first by one side and then by the other. It was referred to by the learned judge and it has been handed up to us, and for what that plan is worth, making the same use of it that was made by both sides and by the learned judge in the Court below, it would appear that the chocolate was stowed at the bottom of the hold in question and the cheese in the upper part. In other words, it would appear that the chocolate was put on board first and the cheese was stowed over it. But in any case the plaintiffs did establish that cheese and chocolate were stowed in the same hold, and that by reason of the hatches being kept on throughout the voyage the ventilation was insufficient, and the chocolate was affected and deteriorated in quality by the proximity of the cheese. I should add this, that it does not appear that this was the first shipment of the kind in which cheese and chocolate had been placed in the same hold. Before the war the ordinary way in which chocolate was sent from Switzerland to this country was by a different route. By reason of that route being closed owing to the war, this chocolate was sent from Switzerland to Genoa and was shipped from Genoa by sea to London. The voyages of the *Thorsa* began apparently in August, 1914, when the war broke out. The date of this bill of lading was, as I have said, December, 1914, and both before and afterwards similar cargoes, chocolate and cheese, had travelled together in a similar manner in the same ship and in the same hold without damage; but in this case the plaintiffs established the damage.

The defendants plead the exceptions in the bill of lading, and the only one that it is necessary to refer to is the exception relieving them from liability in respect of "all loss and damage arising from any act, neglect, or default whatsoever . . . of the officers, engineers, crew, stevedores, servants, or agents of the owners in the management loading or stowing . . . of the ship . . . or otherwise, and the owners being in no way liable for any consequences of the causes before mentioned." Put shortly, that is improper stowage, and the defendants rely on that exception. The plaintiffs meet that in their reply, after joinder of issue, in this way. They say "The defendants are not entitled to rely on clauses 1, 2 or 3 of the bill of lading by reason of the fact that the *Thorsa* when the chocolate was loaded and/or the voyage commenced was not seaworthy or fit for carrying the chocolate in that the chocolate was carried where it was liable to become and did become tainted by cheese." That is to say, they reply specially that it was the improper stowage which occasioned the damage, and then they allege that that rendered the vessel unseaworthy.

It was contended for the plaintiffs that the defendants had failed to prove their defence in that they had not shown that it was some servant of the owners who was responsible for the defective stowage, and that it might possibly have been the owners themselves who might have actually directed the ship to be stowed in the way in which she was. Having regard to the way it is pleaded and to the way in which the case was conducted throughout in the Court below, I am of opinion that this point is not really open. If there were any facts upon which the plaintiffs intended to rely as showing some active intervention of the owners as regards the direction of the stowage in a particular manner, they should have specially pleaded them. But they have not only failed to do this, but further they point to the fact that improper stowage, and not the persons by whom it was done, caused unseaworthiness. That is their defence, and it was upon that defence that they went to trial.

In the present case it is not contended that the ship was in any way defective in design or in structure, or in condition or equipment, at the time when she sailed—not the ship herself. The sole point is the way in which the cargo was stowed. It is not contended that at

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the date when the ship was empty and prepared to receive cargo her condition was in any way defective, nor is it contended that the cargo was so stowed, or that any part of the cargo was so stowed, as to be a serious danger to the ship herself. In other words, the case is not brought within the principle of cases like *Tattersall v. National Steamship Co.* (1), where the defendants had not proved the ship to be reasonably fit for the purpose of the carriage of cattle which they had contracted to take; nor is it within cases like *Kopitoff v. Wilson* (2), or *Ingram & Royle, Ltd. v. Services Maritimes du Tréport* (3), where bad stowage endangered the safety of the ship. The contention put forward really amounts to this, that if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. I am not prepared to accept that. It would be an extension of the meaning of "unseaworthiness" going far beyond any reported case.

In these circumstances I am of opinion that, having regard to the facts established by the plaintiffs' evidence, the ship was not unseaworthy; that there was a failure to prove unseaworthiness; and that there is nothing to prevent the defendants relying upon and being freed from liability by the exception in the bill of lading of "all loss and damage arising from any act . . . of the officers, engineers, crew, stevedores, servants, or agents of the owners in the management loading or stowing . . . of the ship."

I am of opinion therefore that the learned judge in the Court below was right in the judgment that he gave dismissing the action, and that the appeal fails.

PHILLIMORE L.J. In this case the steamship which carried the cargo in question, as appears from the bill of lading, is either owned or chartered by a limited company residing in London, and the home port is London. That is a matter possibly of some little importance when we come to consider one of the points taken for the appellants. The damage to this chocolate was either proved or admitted. I think—we have not heard counsel for the respondents fully on that point—that the nature of the damage was proved, at any rate, I assume it. I assume that this damage was taint of

(1) 12 Q. B. D. 297.

(2) 1 Q. B. D. 377.

(3) [1913] 1 K. B. 538.

chocolate from cheese. In that case the cause of the damage was the negligent stowage of the cheese and chocolate in the same hold. The bill of lading excepts the owners from liability for loss "from any act, neglect, or default whatsoever of the pilot, master, officers, crew, . . . stevedores, servants, or agents of the owners in the management, loading, stowage, discharge or navigation of the ship." This being a foreign port, one would presume that the ship was under the control of the master, and the negligent stowage, one would assume until proof was given to the contrary, would be due to the action or inaction of the master or the negligence of the crew or of the stevedores whom he would employ. No doubt it is possible that there might be express directions by the owners that this cargo should be stowed in this way, but in the absence of proof to that effect, or in the absence of any suggestion to that effect in the pleadings or in the letters which were written before action, I think there was no duty upon the defendants to prove the exclusion of the possible chance of this stowage having been done by the express direction of the owners, and I take it we must suppose that it was done either by the master, the crew, the stevedores, or other servants or agents of the owners for whose negligence they have contracted not to be responsible.

The point taken in answer to that is that the stowage made the ship unseaworthy—not unseaworthy altogether, but unseaworthy quoad this parcel of cargo—unfit to carry it in the way in which it was proposed to carry it. Taking it as not proved that the cheese was there first, taking it as most probable that the cheese came there afterwards, I do not think that it made the ship unseaworthy quoad the chocolate. The point taken upon this by the appellants' counsel was that the moment when seaworthiness is to be tested is the moment when the ship leaves the harbour, and by that time there had been the wrong juxtaposition, and therefore the ship was unfit to continue to carry, in the way in which it was carried, this chocolate. I do not think that is the mode to test this particular kind of unseaworthiness. I am aware of the case of *Cohn v. Davidson* (1), but I do not think it is applicable to this case. When one is dealing with the structure of a ship, a ship may be and must be seaworthy according to stages. If

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(1) 2 Q. B. D. 455. '

C. A. the first stage is the less dangerous stage, and it is intended and
 1916 supposed, as in the ordinary course would be the case, that after

 THE the first stage the ship should be further fitted for the second stage,
 THORSA. it will be enough that the ship is, as it is sometimes called, river-
 Phillimore L.J. worthy for the first stage and seaworthy for the second stage. If
 the first stage is the more dangerous stage, the ship must be worthy
 or fit for it from the beginning. In *Cohn v. Davidson* (1) the ship.
 was seaworthy when she was brought to the quay, but an injury
 to her hull made her unseaworthy before she left the harbour. She
 was sufficiently seaworthy to take in the cargo and to move about
 the harbour ; she was not sufficiently seaworthy to go to sea and
 confront the perils of the seas ; and by reason of the principle that
 you must look at structural seaworthiness in stages the ship was
 held not to be seaworthy. I see no reason to apply such a principle
 to the question of the stowage of two parcels of cargo which are
 placed in juxtaposition in the hold of a ship.

Having regard to all the circumstances of this case, and confining myself to this case and the way in which I apprehend the stowage took place and the damage happened, I am not prepared to say that this ship was in any sense of the word unseaworthy.

I will only add that, if this did constitute unseaworthiness, it would be well worthy of inquiry whether it is not the very unseaworthiness which the owners of the ship contracted not to be responsible for in the clause that I have already cited, of exception in the bill of lading.

BANKES L.J. I agree. The plaintiffs' complaint here was that the defendants had failed to deliver their chocolate in the like good order and condition in which they proceeded to ship it, and they alleged that the mischief was caused because the chocolate had been placed in contact with cheese and had become tainted by it. The defendants' answer to that was this: "We are relieved from any liability in respect of that complaint because the stowage was done either by the master or the officers or the crew or the stevedores—either by the stevedores alone or by them in conjunction with the officers of the ship—and there is a provision in the bill of lading which relieves us from any liability for any such

(1) 2 Q. B. D. 455.

stowage." The answer to that in the reply was that the placing of the cheese and the chocolate in immediate contact in the course of stowage rendered the ship unseaworthy, and the case, therefore, came within the principle of those cases which say that where a shipowner seeks to relieve himself from the obligation to provide a seaworthy ship he must do so in clear and unambiguous language, which he failed to do in this particular bill of lading.

Junior counsel for the plaintiffs has taken the point that the defendants failed to give the necessary evidence that the stowage was the act of the master, officers, crew, or stevedores, either singly or combined. If that had been made a part of the case from the beginning it may be that he would have been entitled to rely on that contention; but looking at the pleadings and at the way in which the case was conducted, and judging as far as one can from the evidence, the examination and the cross-examination, I quite agree with what has already fallen from the other members of the Court, that that point was really not the point in the case in the Court below; it was only raised by counsel at the last moment at a time when it really was not open to him to do so. That being so, one has to consider what the position is with regard to the rest of the case.

The case for the plaintiffs rests entirely on their being able to establish this alleged unseaworthiness. We have been referred to a number of cases, and it is admitted that there is no case which has gone as far as the present contention; and, without expressing any opinion as to what constitutes unseaworthiness, it is quite sufficient to say that in this particular case, if it be unseaworthiness at all, it is unseaworthiness using that term in a particularly narrow sense. But even if the plaintiffs could establish unseaworthiness, they have got to take the next step, which is to show that they bring themselves within the principle I have stated, and that the defendants have failed to indicate in sufficiently clear and unambiguous language that they seek to protect themselves by the clause in the bill of lading from the particular act or class of act of which the plaintiffs are complaining. Upon that point it seems to me that the plaintiffs fail. The complaint here is negligent stowage, negligent stowage which is said to amount to unseaworthiness. I fail to see that there is anything wanting in the language used, either that it can

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C. A. be said to be ambiguous or wanting in clearness when the ship-owner provides that, with regard to stowage, he will not be responsible for the act of the stevedores or the master or the officers.

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In my opinion, in this particular case this appeal fails, and fails upon the ground that the shipowner has clearly and in unambiguous language protected himself against the very class of act of which the plaintiffs complain.

Appeal dismissed. (1)

Solicitors for appellants : *McKenna & Co.*

Solicitors for respondents : *Botterell & Roche.*

E. C. T.

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*July 3 ;
Nov. 6.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(IN PRIZE.)

THE HAKAN.

[1916, No. 1046.]

THE MARACAIBO.

[1915, No. 839.]

Prize Court—Neutral Vessel—Contraband Cargo—Destination to Enemy Port—Condemnation of Vessel—Practice of Maritime States—Order in Council adopting art. 40 of Declaration of London, 1909—Validity.

Neutral Vessel—Contraband Cargo—Destination to Neutral Port—Ultimate Enemy Destination—Knowledge of Shipowner—Condemnation of Vessel.

Apart from the provisions of art. 40 of the Declaration of London, 1909, the attitude and action of the chief maritime States before and since the International Naval Conference of 1908–1909 justify the Prize Court in accepting as part of the law of nations the rule that “a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.”

Where such a proportion of contraband is being carried it is

(1) NOTE.—The point raised in this case appears to have been previously decided by the Court of Appeal, and in the same way, in *Bond, Connolly & Co. and Woodall*

& Co. v. Federal Steam Navigation Co. (1906) 22 Times L. R. 685, which was not cited to their Lordships.

not necessary to prove knowledge on the part of the master or owner that the cargo is destined for the enemy. 1916

The provisions of art. 40 are a limitation of the rights of the Crown, and therefore, in accordance with the doctrines laid down in *The Zamora* [1916] 2 A. C. 77, an Order in Council adopting those provisions is valid. THE HAKAN.
THE MARACAIBO.

Held, therefore, in the case of the *Hakan*, that a neutral vessel, captured while carrying a full cargo of conditional contraband to an enemy base of supply, was subject to condemnation; and in the case of the *Maracaibo*, that the like penalty was incurred by a neutral vessel carrying to a neutral port a full cargo of contraband ultimately destined for the enemy.

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SUIT FOR CONDEMNATION of a neutral vessel for carrying contraband goods to an enemy port and of the cargo as contraband.

The *Hakan*, a Swedish steamship of 484 tons gross, owned by the Kepler Steamship Company, Gothenburg, was chartered on January 11, 1916, by Franz Witte & Co., a German firm of fish dealers carrying on business at Gothenburg and also in Germany. The charter was for a period of at least six weeks with an option of renewal for four months. In the course of a voyage from Haugesund, Norway, to Lübeck with a full cargo of 3238 barrels of salted herrings (conditional contraband) she was diverted by a British warship to Kirkwall for examination, and on April 8, together with her cargo, was seized as prize.

By various orders of the German Federal Council salted herrings imported into Germany had to be delivered to the Central Purchasing Company, Berlin, for distribution.

By the provisions of art. 40 of the Declaration of London, 1909, adopted by Orders in Council of August 20 and October 29, 1914, "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo."

No appearance was entered on behalf of the cargo owners.

1916. June 5, 8. *Sir Frederick Smith, A.-G.*, and *R. A. Wright* (with them *Sir George Cave, S.-G.*), for the Procurator-General. It cannot be disputed that the whole cargo carried by the *Hakan*, which was bound to an enemy base of supply, was confiscable

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THE HAKAN. contraband; the vessel, therefore, is confiscable for carrying it. Before the Napoleonic wars the practice of Great Britain was to condemn vessels seized under such circumstances: *The Mercurius* (1); *The Med Guds Hjelpe* (2); and see the observations of Sir William Scott in *The Neutralitet* (3), decided in 1801, when a more indulgent rule had sprung up. The United States of America, who took their prize law from the British, followed the relaxed rule: *The Bermuda*. (4) Under the rule laid down in *The Zamora* (5) the Court must discover what are the established rules of international law. [Counsel then stated the practice and views of the various maritime States as formulated by the delegates at the International Naval Conference of 1908-1909, which are set out in detail in the judgment.] The body of rules contained in the Declaration of London were the result of the deliberations of the Conference, and the signatory Powers were agreed that the rules corresponded, "in substance, with the generally recognized principles of international law." Art. 41 of the German Prize Regulations, which corresponds with art. 40 of the Declaration of London, has been applied by the German Prize Court during the present war: *The Batavia* (6); *The Brilliant*. (7) In the latter case a Norwegian vessel was brought in as prize for carrying certain goods alleged to be contraband together with other goods not contraband, and was condemned on the ground that the freight on the contraband exceeded half the total freight.

The rule of international law is that where the carriage of contraband is the substantial adventure the ship is liable to condemnation. Therefore art. 40 of the Declaration of London is substantially in accord with international law, and, in so far as it is not in accord, the half and half rule is a mitigation in favour of the shipowner, for under the strict rules of international law less than one half would be sufficient to involve the condemnation of the ship.

Balloch, for the shipowners. The well-established rule of international law is that vessels carrying contraband are free unless

(1) (1799) 1 C. Rob. 288.

Eng. P. C. 309.

(2) (1745) Pratt's Law of Contraband of War, 191 (a); 1 Eng. P. C. 1.

(4) (1865) 3 Wall. 514, 555.

(5) [1916] 2 A. C. 77.

(6) June 1, 1915.

(3) (1801) 3 C. Rob. 295; 1

(7) August 14, 1915.

their owners are also owners of the contraband or there are some circumstances of fraud. Art. 40 of the Declaration of London as adopted by the Orders in Council is contrary to the rule, and therefore, in accordance with the decision of the Privy Council in *The Zamora* (1), the Orders are not binding on the Prize Court. The Declaration itself was not an international agreement, for a number of important States, including Norway and Sweden, were not invited to the Conference, the object of which was to establish a Code which was to be enforced by an international tribunal under the Thirteenth Hague Convention. That Convention was not ratified, and therefore the object for which the Declaration was drawn up has not been fulfilled. Further, by art. 67 of the Declaration it was provided that the Declaration was to be ratified as soon as possible. It has not been ratified by any of the signatories. Even art. 40 itself is not adopted by Order in Council as a provision of the Declaration, for, as a provision of the Declaration, in accordance with art. 65 it would have to be read together with art. 35, under which conditional contraband on vessels bound to neutral ports is free from capture. Art. 35 has not been adopted. Therefore, if art. 40 is read as a provision of the Order in Council and not as part of the Declaration, it would, if the goods had an ultimate enemy destination, make the penalty of condemnation apply to vessels bound to neutral ports with conditional contraband. Consequently art. 40 as a provision of the Order in Council is much more onerous because it authorizes condemnation in cases which would be excepted under the Declaration.

The article is an attempt to compromise the various opinions of the nations, and is contrary to the rule well established and recognized as part of the law of nations by the Prize Court of this country in 1798—*The Ringende Jacob* (2); *The Neutralitet* (3)—and adopted by the United States of America: *The Bermuda* (4); see also Wheaton (Dana's ed.), pp. 664 and 665, n.

So far back as 1601 the penalty was confined to the disallowance of freight: "The certificate of the Lord High Admiral that since the Proclamation of 1589 all food, warlike and shipping stores, in

(1) [1916] 2 A. C. 77.

(3) 3 C. Rob. 295; 1 Eng. P. C.

(2) (1798) 1 C. Rob. 89; 1 Eng. 309.

P. C. 60.

(4) 3 Wall. 514.

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THE HAKAN. neutral vessels voluntarily carried to Spain have been condemned as prize and that no freight has been allowed to the carrier": Laws and Customs of the Sea (Navy Records Society), edited by R. G. Marsden, 1915, vol. 1, p. 317; see also pp. 408 and 460. In Hay and Marriott's Reports there are several cases which show that between 1776 and 1779 the practice was to pre-empt contraband goods, and not only not to condemn the carrying ship, but to allow freight: see *The Vrow Antoinette* (1), *Concordia Affinitatis* (2), *The Renard* (3), *The Drie Gebroeders* (4), and *The Jonge Juffers*. (5) During the Russo-Japanese war in the case of *The Peking* (6) the Japanese Prize Court released a neutral vessel which was carrying cargo the greater part of which was contraband, and in *The Antiope* (7), where the whole cargo was contraband, the same Court ordered the vessel to be released. This decision was reversed on appeal on the ground that "the liability to condemnation of a vessel the object of whose voyage is the carriage of contraband of war is recognized by international law. . . ." No authority is cited for the statement, and it is not in accordance with the decisions of the Prize Courts of Great Britain or the United States, or even with the Japanese Regulations themselves: see Russian and Japanese Prize Cases, vol. 2, Appendix B, p. 432. [*The Aphrodite* (8), *The Knight Commander* (9), and *The Lorenzo* (10) were also referred to.]

Sir George Cave, S.-G., in reply cited the following decisions of the Japanese Prize Court:—*The Roseley* (11), *The Bawtry* (12), *The M. S. Dollar* (13), *The Wyefield* (14), *The Henry Bolckow* (15), and *The Lydia*. (16)

Cur. adv. vult.

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| (1) (1778) Hay & Marriott, 142. | (10) (1914) 1 Br. & Col. P. C. 226. |
| (2) (1778) Hay & Marriott, 169. | (11) (1905) 2 Russ. & Jap. P. C. |
| (3) (1778) Hay & Marriott, 222. | 228. |
| (4) (1779) Hay & Marriott, 270. | (12) (1905) 2 Russ. & Jap. P. C. |
| (5) (1779) Hay & Marriott, 272. | 265. |
| (6) (1904) 2 Russ. & Jap. P. C. | (13) (1905) 2 Russ. & Jap. P. C. |
| 162. | 284. |
| (7) (1906) 2 Russ. & Jap. P. C. | (14) (1905) 2 Russ. & Jap. P. C. |
| 389. | 291. |
| (8) (1905) 2 Russ. & Jap. P. C. | (15) (1905) 2 Russ. & Jap. P. C. |
| 240. | 331. |
| (9) (1905) 1 Russ. & Jap. P. C. | (16) (1906) 2 Russ. & Jap. P. C. |
| 54. | 359. |

July 3. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment :—The claim of the shipowners for the release of this captured vessel was founded upon a proposition that it is a well-established rule of the law of nations that neutral vessels carrying contraband of war are free from capture, subject to certain exceptions in cases where the owners of the vessels are also owners of the contraband, or where they attempt to defraud a belligerent of his belligerent rights to capture the contraband by concealment of destination, by departure from the voyage, or by false papers, or other similar methods. 1916
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Following upon this, it was contended that the provisions adopted by Order in Council from art. 40 of the Declaration of London offended against the rule, and that effect should not be given to them by this Court.

Those provisions are as follows : “ A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.” In the present case the whole cargo was conditional contraband.

The ship was a Swedish vessel, belonging to a Swedish company. Her gross tonnage was 484 tons, and net 271 tons. At the time of capture she was under a time charter (namely, six weeks, with powers of extension for four months) to Franz Witte & Co., well-known German fish dealers carrying on business at Altona and Stettin, as well as at Gothenburg. The agreed hire to be paid by the charterers was 520 kroner per day. The charterparty and the bills of lading are in evidence and can be referred to.

The cargo consisted of 3238 barrels salted herrings consigned from Haugesund to Lübeck. Lübeck is a German base of supply. It is also a port which has been used on a very extensive scale since the war for the importation of goods from Scandinavia into Germany. Moreover, orders have been made by the German Federal Council regulating the import of salted herrings into the German Empire, whereby they must all be delivered to the Central Purchasing Company, Limited, of Berlin, a company acting under the directions of the German Imperial Chancellor. No appearance or claim was entered or made by any of the named consignors or consignees of the cargo or by the charterers, who, of course, knew its destination.

There is no doubt of its contraband character, or of its destination

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for the enemy Government or its forces. The shipowners, although not expressly admitting this, did not contend that in the circumstances it was not confiscable contraband. Their whole case was argued upon the basis that it was.

The shipowners' claim, therefore, raises in a precise form the question of the soundness of their legal proposition. Is there, at the present day, according to the law of nations, a well-established rule in favour of a contraband-carrying vessel to the effect stated ?

There is no doubt that the law to be administered in this Court is the law of nations (or "international law" as it is often called), and not our municipal law. As was recently stated by the Lords of the Judicial Committee of the Privy Council in *The Zamora* (1), it is "a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other, or in express international agreement."

It has naturally fallen in course of time within general principles—easily understood although not always capable of precise definition—which have been approved of as equitable by jurists and judges, and acted upon in practice by States. From its nature it is subject to modifications as time rolls on and the world's international conditions change ; but its development should be along the lines of the same equitable principles as between nations.

The law as to contraband goods illustrates these developments as well as any of the subjects with which it deals. It is not necessary to elaborate this theme. But it is essential, in considering the law of contraband in its relation both to ships and to goods, to bear in mind that the principle upon which it is founded is that it must be allowed to belligerents to use their maritime powers to interfere to some extent, and indeed, as has been established, to a considerable extent, with the commerce of neutral countries in order to prevent goods being conveyed to the enemy which might enable or help the enemy to prolong or carry on a war with success.

If a belligerent has a right by means of capture and subsequent condemnation to prevent contraband goods from reaching the enemy and to have them confiscated, it would appear to be not unfair or unreasonable that the belligerent should also have rights of a like

(1) [1916] 2 A. C. 77, 91.

kind against the vessel in which the goods were being carried. The goods could not reach the enemy without the help of the vessel. The transaction in the ordinary course involves the conjoint operation of the owner of the goods and the owner of the vessel. The one trader is selling his goods for profit, the other trader is letting his vessel on hire for profit to transport them. Why should one of these two classes of traders in case of capture lose his property and the other have it preserved? It may be urged that this comparison of the position imports to the shipowner actual knowledge of the character of the goods carried on his vessel. But it does not necessarily do so. If a shipowner allows his vessel to be chartered or used in such a way that contraband goods may be laden upon it for transport to an enemy, whether he be aware of the use to which his vessel is put or not, it does not appear to be inequitable that he should suffer from the results of such a use of his vessel as would enure to the enemy's benefit.

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This element of the knowledge of the shipowner has entered into the discussions upon the question of his ship being involved in liability, and it will be considered hereafter in the general aspect of the law, and also in reference to the facts of this particular case.

The ancient practice in this country before the Napoleonic wars, apart from special treaties, was that neutral vessels carrying contraband goods were subject to capture and condemnation, as were the goods themselves. Upon general principles such a practice seems to me to be consistent with equitable rights as between belligerent and neutral traders.

Sir William Scott said of it that "it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such (contraband) articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent": vide *The Neutralitet*. (1)

The confiscation of the ship had been justified by Bynkershoek and other jurists of authority. It is true, however, that by the time of Lord Stowell a relaxation of the practice was introduced, whereby the ship was regarded as non-confiscable, except in certain cases of the character already mentioned. But it is to be noted that

(1) 3 C. Rob. 295, 296; 1 Eng. P. C. 309.

1916 if the owner of any part of the contraband cargo was also the owner
 THE HAKAN. of the ship, or any share in it, the ship, or his share, was still held to
 The President. be subject to confiscation : see *The Jonge Tobias*. (1)

It is difficult to ascertain precisely the reasons for the relaxation made in those times. It was probably due partly to the policy of this country in relation to neutral commerce, and to the frequency of treaties dealing with the subject. The legal ground for its introduction, however, was "the supposition that freights of noxious or doubtful articles might be taken without the knowledge of the owner" : see per Sir William Scott in *The Neutralitet*. (2)

On reference to the practice of other nations, it will be found that at this very period the French Règlement of July 26, 1778, was in force. Under the Règlement the ship was declared subject to confiscation if three-fourths in value of the cargo consisted of contraband goods. It is true that this was regarded by some authorities as merely part of the municipal law of France, but by others (including Ortolan) as applicable between States, unless of course treaties contained different provisions, as, e.g., the Treaty of September, 1800, made for a period of eight years between France and the United States. Its provisions were maintained by the French Instructions of March 31, 1854, and those of July 25, 1870 : see Bonfils, 7th ed., s. 1578. Indeed, the Règlement remained in force ever since, at any rate until 1914, when the Government of France adopted the provisions of art. 40 of the Declaration of London.

During the Crimean War the question relating to vessels does not appear to have come up for decision in any Court of Prize.

But not only did France adhere to the Règlement referred to during that war, but Russia also by a Declaration issued on April 19, 1854, pronounced that neutral vessels carrying contraband would be stopped by her cruisers and declared lawful prizes of war in conformity with the Declaration of November 27, 1853 : see the *London Gazette*, May 2, 1854, p. 1364.

The matter was dealt with during the American Civil War in *The Bermuda*. (3) The relaxation of the time of Lord Stowell was

(1) (1799) 1 C. Rob. 329 ; 1 (2) 3 C. Rob. 295, 296 ; 1 Eng. P. C. 146. P. C. 309.

(3) 3 Wall. 514, 555.

referred to in that case as follows: "This has been called an indulgent rule, and so it is. It is a great, but very proper relaxation of the ancient rule, which condemned the vessel carrying contraband as well as the cargo." Then came the following passage in the judgment: "But it is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof."

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This "presumption" seems to refer to the knowledge of the shipowner of the nature of the cargo. It is not easy to understand the meaning of the phrase "intent to take hostile part." If the shipowner had knowledge of the contraband character of the goods, it would appear to follow that in allowing their shipment he had the "intent" to help the enemy. However this may be, the so-called indulgent rule which *prima facie* permitted the ship to escape confiscation was clearly regarded by the United States Court as subject to qualification by reason either of the knowledge, or the intention, of the shipowner as to the enemy destination of the contraband cargo.

The attitude of the United States upon this question in later times will be pointed out hereafter in the appropriate period, as exemplified and defined in their Naval War Code promulgated in 1900 (amended in a few particulars in 1903), which was commended by the United States to the International Naval Conference of London in 1908.

In Europe, about the same time as the American Civil War was proceeding, Prussia, Denmark, and Austria promulgated Prize Regulations (in the early part of 1864) whereby ships carrying contraband goods were declared subject to confiscation if the whole cargo consisted of contraband: see Kleen on Contraband, p. 210, and Bonfils, 7th ed., s. 1578.

Later, in the war of 1866, Austria went further and declared ships to be lawful prizes which carried contraband bearing a "proportion of contraband which was considerable in reference to the whole cargo": see Kleen, p. 210, n.

Italy, according to art. 215 of her Mercantile Marine Code,

1916 admitted the confiscability of the ship and contraband goods laden
 THE HAKAN. upon her, but freed the innocent goods ; and this rule was applied
 The President. by her during the war of 1866 : Bonfils, s. 1578.

Reference has been made to the reiteration by France in 1870 of the three-fourths rule.

In the development of the history of the subject, the next important stage is reached in the theories and practices of the Empires of Russia and Japan before, and in the course of, the Russo-Japanese war. These two Powers waged war on sea as well as on land. Their rules and practices in naval warfare are therefore of importance in ascertaining the law of nations at a period when the conditions of neutral and international trade carried over the seas were to all intents and purposes those of the present day. The decisions of their respective Prize Courts in cases arising out of that war must also have a close bearing upon the rules of international law regarded by these two States as governing the liability of ships carrying contraband.

The Russian Prize Regulations were decreed on March 27, 1895 (nine years before the war). By these regulations merchant vessels of neutral nationality were declared liable to confiscation as prizes if found conveying to the enemy or to an enemy port certain contraband articles and substances for firearms or explosives whatever the amount of such might be, and other articles of contraband of war amounting in bulk or weight to more than half the entire cargo, provided that it was not proved that the masters of the vessels concerned were unaware of the nature of the cargo and of the declaration of war (regulation 11 (1.)).

After the declaration of war no other knowledge either on the part of the owners or masters was required to be proved or to exist. These provisions were applied in the cases of British, German, and Danish vessels, with the effect that vessels were condemned where the contraband carried was more than half the cargo, and released where it was less : see *The Arabia* (1) ; *The Knight Commander* (2) ; *The Calchas* (3) ; *The St. Kilda* (4) ; *The Prinsesse Marie*. (5)

(1) (1904) 1 Russ. & Jap. P. C. 42.

(4) (1908) 1 Russ. & Jap. P. C.

(2) 1 Russ. & Jap. P. C. 54.

188.

(3) (1905) 1 Russ. & Jap. P. C.

(5) (1908) 1 Russ. & Jap. P. C.

118.

276.

British ships were condemned on this ground ; and no protest against the condemnation was made by the British Government to the Russian Government.

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The Japanese Regulations as to capture at sea are not so precise. They were issued after the war with Russia began. They came into force on March 15, 1904. They provided that ships carrying contraband of war were liable to capture without regard to their nationality, and that the fact that a master was ignorant that contraband articles were on board could not be held to be a reason for exemption from capture (arts. 37 and 38). They also provided that the ship should be condemned if the owner of the ship and of the contraband articles were one and the same person (art. 43). But they contained a general rule which prescribed that with regard to matters which were not determined by law, treaty, or the Japanese Regulations the principles of international law should be followed (art. 10).

If the cases decided by the Japanese Prize Courts are examined it will be seen that the principle of international law most often applied was the one which may be formulated from the statement of the reasons of the Court in various cases, thus : " International law recognises the liability to condemnation of a vessel the *object of whose voyage* is the carriage of contraband of war ; and this rule is in accordance with what is just and reasonable, and with correct and fundamental principles." As to the determination of what was " the object of the voyage," the Japanese Higher Prize Court held that if the greater part of the cargo was contraband, it must be concluded that the " object of the voyage " was the carriage of contraband. Applying this test and the rule referred to, the Japanese Courts condemned as prizes ships of various nationalities, British, British colonial (chartered by Americans), German, and Norwegian : see *The Roseley* (1) ; *The Aphrodite* (2) ; *The Scotsman* (3) ; *The Bawtry* (4) ; *The M.S. Dollar* (5) ; *The Wyefield* (6) ; *The Paros* (7) ; *The Henry Bolckow* (8) ; *The Lydia* (9) ; *The Antiope*. (10)

(1) 2 Russ. & Jap. P. C. 228.

(6) 2 Russ. & Jap. P. C. 291.

(2) 2 Russ. & Jap. P. C. 240.

(7) (1905) 2 Russ. & Jap. P. C.

(3) (1905) 2 Russ. & Jap. P. C. 301.

256.

(8) 2 Russ. & Jap. P. C. 331.

(4) 2 Russ. & Jap. P. C. 265.

(9) 2 Russ. & Jap. P. C. 359.

(5) 2 Russ. & Jap. P. C. 284.

(10) 2 Russ. & Jap. P. C. 389.

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The next important phase in the history of the question was the attitude of the various Powers which took part in the International Naval Conference held in London in 1908-1909.

Before the Conference was held, and in order to provide a basis for its discussion, the various Governments were invited by the British Foreign Secretary to "interchange memoranda setting out concisely what they regard as the correct rule of international law" on each of the heads enumerated, amongst which was the following: "Contraband, including the circumstances under which particular articles can be considered as contraband; the penalties for their carriage, &c., &c."

It will be noted that the Powers were thus asked to state what they regarded as the correct rule of international law at the time on the subject of the confiscability of neutral vessels carrying contraband, and not what changes they desired to effect. It therefore seems material to have regard to the views then expressed by the various States called into international consultation in considering the question whether there was any, and if so what, well-established rule on the subject according to the law of nations. The statements for the various countries will be taken in the order in which they appear in the proceedings. Concisely summarized they are as follows:—

Germany.—The ship carrying contraband of war is subject to confiscation, if the owner, or the charterer of the whole ship, or the master, knew, or ought to have known, that there was contraband on board and if that contraband forms more than a quarter of the cargo, either by value, weight, or volume.

The United States of America.—For the views of the Republic the Department of State referred to its Naval War Code of 1900, as amended in a few particulars in 1903.

The Naval Code of 1900 was prepared for the guidance and use of the naval service of the United States by Captain Charles H. Stockton (captain and afterwards rear-admiral of the United States Navy, and president of the George Washington University) under the direction of the Secretary of the Navy, and was approved by the President of the United States, and published "for the use of the navy and for the information of all concerned." Rear-Admiral Stockton was a Delegate Plenipotentiary of the United States at the London Naval Conference.

According to the Code a neutral vessel carrying the goods of an enemy is, with her cargo, exempt from capture *except when carrying contraband of war*, or endeavouring to force a blockade or guilty of having rendered hostile assistance to the enemy. And, further, vessels, whether neutral or otherwise, carrying contraband of war destined for the enemy are liable to seizure and detention (that means capture), unless treaty stipulations otherwise provide.

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Austria-Hungary.—The Memorandum did not state what was regarded as the international law on the subject. It contained observations as to the desirability of making certain changes in the law.

(The regulations and practice of Austria in 1864 and during the war of 1866 have already been adverted to.)

Spain.—This Memorandum also omits a statement of what Spain regarded as the law, but it contained the suggestion that between the system which allows the confiscation of ships carrying some contraband, whatever the quantity, and that which only entails that result in cases of resistance or fraud, it might be possible to provide an intermediate rule to the effect that if the shipmaster and ship-owner knew or could have known that the ship carried contraband, the ship should be responsible to the captor in a ransom or confiscation equal to three times the value of the contraband and five times that of the total freight; and in default of freight the captor should only have recourse in execution against the ship and while she remained in his hands.

France.—Neutral vessels and the whole of their cargo—contraband or otherwise—are confiscable if the contraband cargo forms three-quarters in value of the whole cargo. (This is according to the rule of 1778 above referred to, and the French rules and practice ever since.)

Great Britain.—Any interest in the ship carrying the contraband which belongs to the owner of the contraband is subject to condemnation. The ship is also subject to condemnation in case of forcible resistance, or of the carrying of false or simulated papers, or of other circumstances amounting to fraud.

Italy.—Neutral ships with cargo finally destined for the enemy country, which consists in whole or in part of contraband of war, are subject to capture, and the ships and contraband goods will be

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confiscated, but only when it appears that the owner was not aware that his vessel was intended to be used for the carrying of contraband.

Japan.—Ships carrying contraband of war and their cargoes belonging to the shipowner are subject to confiscation if fraudulent means are used for the carriage of the contraband ; also when the carriage of contraband goods is the principal object of the ship's voyage ; and also when the contraband goods belong to the shipowner. But a ship having contraband goods on board is not on that ground alone subject to capture if the master had no knowledge, actual or presumed, of the outbreak of hostilities.

Holland.—A ship carrying contraband is subject to confiscation if an important part of the cargo consists of contraband, unless it appears that the master, or the charterer, could not have known the real nature of the cargo, or if the master resists the arrest, visit, or capture of the vessel.

Russia.—Neutral vessels are subject to confiscation when they carry contraband of war forming by volume, weight, or value more than a quarter of the whole cargo, or when they carry contraband goods in lesser quantity, if their presence on board by their nature or quality could obviously be known to the master ; and ships carrying contraband goods less than a quarter of the cargo are liable to make compensation to the extent of five times the value of the contraband part of the cargo.

Such were the views put forward by the various High Powers before the holding of the Conference.

The result of the deliberations of their representatives at the Conference upon this question was the adoption of the rule in art. 40 of the Declaration of London, that the vessel is subject to condemnation if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo. It is not unimportant to note that this was adopted unanimously. There was no ratification of the Declaration of London as a whole by this country, nor, so far as I am aware, by any other of the States represented. But by Orders in Council the provisions of art. 40 were adopted by the Crown. They have also been adopted by our Allies—France, Russia, Italy, and Japan. Russia's Prize Regulations decreed in 1895 were the same, except that value or freight have now been added as tests of confiscability. Germany shortly

after the Conference incorporated art. 40 in her Prize Code of September 30, 1909, and it still forms part of the German Prize Law. It has also been acted upon in decisions of the German Prize Court. Austria-Hungary also included it in her Navy Regulations in May, 1913, which had the following introduction:—"By agreement between the commercial and maritime countries most concerned, including the Austro-Hungarian Monarchy, a large number of questions with regard to international law on maritime war have been regulated. The provisions of international law on war, in so far as such have been fixed by agreements, are hereby published, so that they may be observed in the event of war." As to America, the rule formulated in art. 40 is assumed to be the present law in the last work of Captain Charles H. Stockton on International Law (published at the end of October, 1914), whose position I have already described. On the subject of that rule he wrote in the report of the American Delegation to the Secretary of State that "much relief is afforded to neutrals in respect to the penalty of carrying contraband. In the first place, the ship is not subject to confiscation unless more than half the cargo is contraband, to be determined either by weight, volume, value, or freight value" (p. 437).

What has been stated shows the attitude of the chief maritime Powers to what was unanimously agreed by their representatives at the Conference of London.

Sweden was not then represented, and I do not know whether any step has since been taken by Sweden in respect of the liability of neutral ships. But one thing is clear, that Sweden and her ship-owners and merchants had abundant notice of what the belligerents had declared they would do in such cases. It is certain that no Swedish shipowner indulging himself in the warm prospect of abundant profit, or any one else engaged in the cold contemplation of unprofitable theory, ever thought that if a Swedish ship was captured by a British cruiser while carrying a full cargo of contraband to Germany she would be immune from condemnation; whilst if she was carrying something over half her cargo (in weight, volume, value, or freight) to the United Kingdom, she would, if captured by a German war vessel, be subject to condemnation. In the interest of neutrality, such a temptation to neutrals to serve one belligerent with contraband goods, to the exclusion of the other, ought to be

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removed, if it can be done consistently with fair principles and with the rules of international law.

In the light of what has been set out, the case has to be considered from two, or perhaps three, points of view. First, apart from any resolutions or articles of the London Conference, what was the rule of the law of nations affecting a vessel which, in the circumstances of this case, was carrying a cargo consisting wholly of contraband destined for the enemy? Secondly, was the Order in Council adopting art. 40 of the Declaration of London so contrary to such a rule that the Order was invalid; or was it sufficiently consistent with such a rule, or did it so mitigate the rule in favour of the enemy that it acquired validity, in accordance with the doctrine stated by the Privy Council in *The Zamora*? (1) Or, thirdly, did the acts of the representatives of the various Powers at the Conference, and the subsequent action and practice of their States, bring into existence, by a sufficiently general consensus of view and assent, a new or modified rule of the law of nations upon the subject, to which effect ought to be given in their Prize Courts at the present day, apart from any Order in Council?

As to the first, having regard to the decrees and practices of the nations for the past hundred years, I should feel bound to declare that the old rule which prevailed before the relaxation introduced a century or more ago should be regarded as valid at the present day. This means that the so-called well-established rule in favour of a contraband-laden ship contended for by the claimants does not exist. In the days of the relaxation referred to the ship was subject to confiscation in many respects, which were sometimes called exceptions. It has always been held that, if any part of the contraband carried belonged to the owner of the ship, the ship itself was subject to the penalty of confiscation as was the contraband. According to our most recent writers the vessel suffered if her owner was privy to the carriage of the contraband goods whether they belonged to him or not: see Westlake, 2nd ed., part ii., p. 291; Hall, 6th ed., p. 666. In the present day, even more than in the past, the owner must be taken to know either directly or through the master how his vessel was laden, or to what use she is put. In the days of Lord Stowell it was made clear that the master was

(1) [1916] 2 A. C. 77.

bound in time of war to know what his cargo consisted of ; for to hold otherwise would be to excuse real or feigned ignorance, and so admit without penalty the carrying of contraband : cf. *The Oster Risoer* (1) and *The Richmond*. (2)

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This leads me to advert to the special facts of the present case upon the question of the knowledge of the shipowners.

The vessel was chartered, as stated, for a short time to German merchants. The value of the vessel was not given ; it might be estimated from her tonnage. I cannot estimate it, but it could be done. But from the charterparty it appears that the vessel was hired at a rate per annum equal to nearly double the sum at which she had to be insured under the charterparty.

She was therefore hired at a sum which represented close upon 200 per cent. per annum of her capital or insurable value. She was not an ocean-going vessel. Can there be any doubt that her owners knew she was going to be engaged in the contraband trade between Scandinavia and Lübeck, or some German Baltic port ? No evidence was given for the owners that they had no knowledge of the purpose for which she was hired. Indeed, no suggestion was made that they did not know how she was to be employed.

I should have no hesitation in drawing the inference that they did know. Moreover, if owners, in times of war, and in waters favourable to contraband trading, enter into time charter contracts, it would be placing premiums upon contraband trading to allow the owners to protect themselves by relying on charterparties and sheltering themselves behind a screen of ignorance of their own deliberate construction. The vessel's immunity or penal responsibility ought not to depend upon such arrangements.

Apart, therefore, from any Order in Council adopting the half-cargo rule of art. 40 of the Declaration of London, I should pronounce judgment for the condemnation of the vessel as prize.

Secondly, it follows from what I have stated that the provisions of art. 40 were a limitation or mitigation of some of the rights of the Crown ; and the result of the decision in *The Zamora* (3) is that accordingly the provisions in the Order in Council are valid.

Thirdly, although there is no formal instrument binding as an

(1) (1802) 4 C. Rob. 199 ; 1
Eng. P. C. 382.

(2) (1804) 5 C. Rob. 325, 333.

(3) [1916] 2 A. C. 77.

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international convention, I think that the attitude and action of the most important maritime States before and since 1908 have been such as to justify the Court in accepting as forming part of the law of nations at the present day a rule that neutral vessels carrying contraband which, by value, weight, volume, or freight value, forms more than half the cargo are subject to confiscation, and to condemnation as good and lawful prizes of war.

The judgment of the Court is that the *Hakan* together with her cargo is condemned as good and lawful prize, and that she be sold by the Marshal of the Court.

*Leave to admit an appeal within one month ; security
350l.*

Solicitor for the Procurator-General : *Treasury Solicitor.*
Solicitors for claimants : *Botterell & Roche.*

THE MARACAIBO.

SUIT FOR CONDEMNATION of a neutral vessel for carrying to a neutral port contraband goods ultimately destined for the enemy.

The *Maracaibo* was a Danish sailing ship of 324 tons register belonging to one H. H. Clausen. In March, 1915, being then at Hamburg, the *Maracaibo* was chartered by one Engelbrecht, an Amsterdam merchant, to proceed to Maracaibo, Venezuela, and there load a full cargo of divi-divi for carriage to Amsterdam. When the cargo was loaded in August, 1915, divi-divi was conditional contraband. On October 14 it was declared absolute contraband. On October 18, in the course of her homeward voyage, the *Maracaibo* was sent into Lerwick by a British warship, and on November 9 and December 5 respectively the cargo and ship were seized as prize. The writ was issued on December 24, 1915. On July 31, 1916, the case came before the learned President, who held that Engelbrecht was merely the agent of one Isidore Weil, of Hamburg, and accordingly condemned the cargo as being absolute contraband destined for the enemy at Hamburg.

The question whether the vessel was also subject to condemnation was reserved.

1916. Oct. 12, 16. *Sir Maurice Hill, K.C. (T. Mathew with him)*, for the Procurator-General. The *Maracaibo* had been chartered to Weil on previous occasions to carry divi-divi to Hamburg. Assuming, therefore, that there must be proof of knowledge on the part of the shipowner that the cargo had an enemy destination, there is abundant evidence that the shipowner knew that his vessel was carrying a contraband cargo to the enemy; and the onus is on him to disprove knowledge. But knowledge is not essential; the sole test is the proportion of contraband carried. The old rule under which the penalty was confined to loss of freight did not depend on knowledge: *The Ringende Jacob* (1); *The Jonge Tobias* (2); *The Neutralitet* (3); see also *The Atalanta* (4) with regard to the carriage of despatches, and Pyke's *Law of Contraband of War* (1915), pp. 231—236.

The American rule, exemplified in the cases of *Carrington v. Merchants Insurance Co.* (5), *The Bermuda* (6), *The Springbok* (7), and *The Peterhoff* (8), under which neutral vessels carrying contraband were free unless sailing with false papers or guilty of other deceptive practices, was an indulgent rule and not the rule of international law according to *The Hakan*. The same rule applies whether a vessel is bound with contraband to an enemy port or to a neutral port if the cargo has an ultimate enemy destination, and, in accordance with the principles stated in *The Hakan*, the *Maracaibo* should be condemned.

MacKinnon, K.C., and *R. A. Wright*, for the claimants. The condemnation of a neutral vessel for carrying contraband is a punishment for engaging in a kind of unneutral service, and knowledge on the part of the shipowner is essential. Where the vessel is bound with a contraband cargo to an enemy port, knowledge, possibly, may be presumed. The case is entirely different where the vessel is bound to a neutral port. Speaking generally, shipowners cannot know the destination of cargoes carried in their vessels further than what, so far as they are concerned, is the port of delivery. There is

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| (1) (1798) 1 C. Rob. 89; 1 Eng. P. C. 60. | (4) (1808) 6 C. Rob. 440, 459; 1 Eng. P. C. 607. |
| (2) (1799) 1 C. Rob. 329; 1 Eng. P. C. 146. | (5) (1834) 8 Peters, 495, 519. |
| (3) (1801) 3 C. Rob. 295; 1 Eng. P. C. 309. | (6) (1865) 3 Wall. 514. |
| | (7) (1866) 5 Wall. 1. |
| | (8) (1866) 5 Wall. 28. |

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no English case in which it has been sought to condemn a neutral vessel under the doctrine of "continuous voyage" for carrying contraband goods to a neutral port. During the American Civil War the question arose in *The Peterhoff* (1), which was a case of contraband, and in *The Bermuda* (2) and *The Springbok* (3), which were blockade cases, and even in the latter cases it was held that the vessels could not be condemned unless found guilty of fraudulent practices: see also *The Mashona* (4) and the unratified art. 35 of the Declaration of London, which provides that conditional contraband itself on a neutral vessel bound to a neutral port is free from capture.

[THE PRESIDENT referred to *The Stephen Hart*. (5)]

Sir Maurice Hill, K.C., in reply cited *The Dolphin*. (6)

Cur. adv. vult.

Nov. 6. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:—This Danish ship was captured in October, 1915, on a voyage from Venezuela to Amsterdam. She carried a full cargo of divi-divi, namely, 287,654 kilos. At the time of the commencement of the voyage divi-divi had been declared conditional contraband. Before the capture it had been declared absolute contraband. The cargo has already been condemned by a judgment of this Court. The questions now remaining to be determined relate to the vessel. Her owners claim her release, and also freight, costs, and expenses. The Crown asks for judgment for her condemnation.

The application of the Crown is founded on two contentions, one of fact and one of law. In the first place it is contended that the vessel is subject to condemnation because her owners, or master, who was also part owner, knew that the vessel was laden with a full cargo of contraband destined ultimately for the enemy at Hamburg; and, further, that they or he participated in the deception by which it was intended and attempted to convey the contraband goods to one Weil at Hamburg, through a nominal agent or intermediary, of the name of Engelbrecht, at Amsterdam. In the second place, it was contended that the carriage of the contraband goods, forming

(1) 5 Wall. 28.

(2) 3 Wall. 514.

(3) 5 Wall. 1.

(4) (1900) 17 Cape S. C. 135.

(5) (1863) Blatch. P. C. 387.

(6) (1863) 7 Fed. Cas. 868.

the whole of her cargo, upon a continuous voyage or transit which was to end in enemy territory, rendered the vessel subject in law to confiscation and condemnation, whatever the state of knowledge of the owners or master may have been.

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If the Crown succeeds in the first contention on the facts, the legal question need not be decided. But the question of law has been fully argued ; and as it is one of considerable and general importance, and the parties are all anxious that it should be decided, I have thought it right to pronounce the judgment of the Court on this point also.

It is not necessary to repeat what I said about the facts when the cargo was condemned. The charterparty was made on March 27, 1915, and purported to be signed by Svarrer, the master, and Engelbrecht, the charterer. Where it was signed I was not told. The vessel was at Hamburg at the time. She had been lying at Hamburg from September 16, 1914. Her last voyage had been from Venezuela to Hamburg with a cargo of divi-divi for Weil. The voyage had commenced before the war. She was given a clearance certificate to continue that voyage by one of His Majesty's boarding ships off our shores on September 3, 1914. She lay at Hamburg from September 16, 1914, until April 1, 1915, when she started on her outward voyage under the charterparty referred to. She had been chartered for other voyages in previous years by Weil to carry divi-divi to Hamburg. On all these voyages Svarrer was the master of the vessel. What he did, or where he was, while the vessel lay at Hamburg, or when the charterparty was signed, his affidavit does not disclose. He says that the charterparty was arranged between Hans Hansen Clausen and the said Engelbrecht. He gives no information whatever about the position of Engelbrecht, or about any communications with him.

The Danish Insurance Institute informed H. H. Clausen before the voyage began that divi-divi " had been declared contraband by the English." They did not in their communication distinguish between conditional and absolute contraband. When the ship left Hamburg on her outward voyage she went through the Kaiser Wilhelm Canal. Earlier in the proceedings I decided that Engelbrecht, of Amsterdam, was a mere tool of Weil, of Hamburg. He filed no evidence. Later he and Weil fell out ; and Messrs. Toe, Laer & Co., of Amsterdam, were installed by Weil in Engelbrecht's place, and were by Weil's

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arrangement to be called "Smith" in any telegrams which might be sent. The shippers, Juan E. Paris & Co., were the same firm who had sent the previous cargoes of divi-divi to Weil at Hamburg in the same vessel, with Svarrer as master. No evidence was given of any business acquaintanceship or connection between the shippers and Engelbrecht. I cannot accept the bald uncorroborated story of the master that neither he nor the owners had any knowledge or suspicion that the goods had an enemy destination or were enemy property, or that they were contraband of war. The last statement is refuted by the letter of March 29, 1915, from the Danish Insurance Institute to Clausen informing him that divi-divi was contraband.

On the whole of the facts I think the right conclusion is that the master and the owners knew that the goods laden in this vessel were destined for Weil in Hamburg, and that the master of the ship knew this when he put forward Engelbrecht as the bona fide neutral consignee in order to form the basis of his support of the owners' claim. It is hardly necessary to add that the claims for release of the ship, and for freight, expenses, &c., are all barred.

It remains to consider the question of law. It can be done with more brevity, because I have expressed my views on the penalty attaching to vessels carrying contraband in the judgment pronounced in the case of the steamship *Hakan*.

It was argued that the present case is distinguishable from *The Hakan* on the ground that the voyage of the *Hakan* was to an enemy port, whereas the voyage of the *Maracaibo* was to a neutral port, and that her cargo was only condemnable because it was carried over part of a "continuous voyage" to the enemy in enemy territory. The principles on which the *Hakan* judgment was based, it said, did not apply to "continuous voyage" cases. It was contended that in these latter knowledge must still be proved, and proved affirmatively, by the captors.

There does not seem to me to be any good reason for any such distinction.

A vessel may be carrying conditional contraband to an enemy port; but it is only in certain cases, e.g., where it is proved that the contraband was destined to the enemy Government or forces, or for a base of supply, that they can be condemned. A vessel may also be carrying absolute contraband to a neutral port; but again it is

only on proof that the contraband goods were destined, by transhipment, or land transit, for the enemy country that they are subject to condemnation. The effect on belligerents would be similar in either case. The trade, if successful, would in both cases be injurious to the belligerent entitled to make the capture, and helpful to the enemy. It is difficult to see why the penalty in the case of the vessel should be different.

It is to be noted that art. 40 of the Declaration of London applied to the carriage even of conditional contraband by continuous voyage and transit over land, where the enemy country had no seaboard. Knowledge did not enter into the question. The vessel suffered the same penalty.

I think that in the present state of the law, as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether, where such a proportion of contraband is being carried as forms half the cargo in weight, bulk, value, or freight. The principle applies, in my view, whenever the vessel carries that proportion or amount of confiscable contraband (absolute or conditional), whatever the circumstances or facts may be which make it subject in law to confiscation. In other words, if a vessel proceeding to a neutral port carries such a cargo as is properly captured as prize because it is absolute or conditional contraband destined ultimately for enemy territory, or for enemy forces or bases of supply, the offence of the vessel is the same as if she were carrying conditional contraband to an enemy port ; and it would seem to me that the same penalty in respect of the vessel should follow. If it is not necessary to prove the knowledge of the owners in the one case, it ought not to be in the other. I cannot see the reason for a distinction either in logic or in practice. The trade in contraband, though one in which neutrals may like to engage, is necessarily of a risky nature. Great risks often mean huge profits. But the risks are ascertainable. And if belligerents are to avail themselves of their acknowledged rights to capture at sea, neutrals must, in order to garner the profits, either face the risks and the ensuing penalties or provide for them by their contracts, or protect themselves from them by insurance.

The practical rule (adopted in *The Hakan*) of making the quantitative or qualitative extent of the contraband the test instead of

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knowledge avoids the necessity for the Courts to embark upon the very difficult and often unsatisfactory inquiry into the state of mind or extent of information of the persons concerned. From experience in this Court I can testify to the difficulty. The tribunal might often feel a certainty that knowledge existed which would satisfy any conscientious person, without being able, perhaps, to set out step by step sufficient or precise proof of it. Experience also shows not only the ingenuity and multitudinous character of the devices and shams resorted to in carrying on contraband trading, but how often it is only by the interception of letters, or cables, or wireless messages that the deceptions can be detected and disclosed.

And even if there is not, in truth, any actual knowledge, is the trader to defeat belligerent rights by taking care not to know, by a species of "voluntary ignorance"?

I hazard the opinion that not many of the shipowners or masters of ships belonging to the Scandinavian or Dutch countries are suffering from any want of knowledge of how articles of a contraband character are sent to Germany, either by water or by land, from neutral ports, which could not reach Germany by direct voyages to her own ports. Knowledge of the destinations of such articles in particular cases may be difficult to establish by actual and direct proof. If the rule of law is now as I have stated it, Prize Courts will be able to do substantial justice and to act in accordance with the law, without any apprehension in the mind of any one that their conclusions are founded on suspicions rather than on facts established by strict proof.

For the reasons given, I decide that on the facts the *Maracaibo* must have been condemned on the ground of the knowledge of the owners and their master; and, furthermore, that the principles of *The Hakan* decision apply to "continuous voyages," and that therefore, in law (apart from any question of knowledge), the *Maracaibo* must be condemned.

Liberty to admit an appeal within six weeks ; security
 350l.

Solicitor for the Procurator-General : *Treasury Solicitor.*

Solicitors for claimants : *Stibbard, Gibson & Co.*

E. C. T.

IN THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

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ADMIRALTY.

(IN PRIZE.)

THE ST. TUDNO.

[1916, No. 855.]

Prize Court—Ship registered as British Ship—Seizure as Prize—Owner-ship—British Company under Enemy Control—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

A steamship registered as a British ship, which had been chartered to the Admiralty after the outbreak of war between Great Britain and Germany, was seized as prize on the ground that she was enemy property or the property of a company controlled by the enemy. She was used as a tender for the vessels of the Hamburg-Amerika Linie coming to Southampton and was nominally owned by a British company. The Hamburg-Amerika Linie appointed the directors, who paid nothing for their qualification shares; took from them an agreement to conform to its instructions; received the profits; and, in the person of its nominees, owned the entire share capital issued by the company:—

Held, that it was the duty of the Prize Court to look beyond the nominal ownership and to ascertain who were the real owners of the vessel; that the real owners were the Hamburg-Amerika Linie; and that the vessel, therefore, was enemy property and must be treated like any other enemy merchant ship actually in port at the outbreak of hostilities.

Order for detention as in *The Chile* [1914] P. 212.

SUIT FOR CONDEMNATION OF A SHIP AS PRIZE.

The *St. Tudno*, a steel paddle steamer of 754 tons gross register, was purchased in September, 1912, on behalf of the Hamburg-Amerika Linie, a German corporation, for 19,500*l.*, and on October 1, 1912, was transferred by registered bill of sale to the MacIver Steamship Company, Limited, a British company duly incorporated and registered under the Companies Acts, and the vessel was registered under the Merchant Shipping Act, 1894, as a British ship. She was used as a tender at Southampton to the vessels of the Hamburg-Amerika Linie. The MacIver Steamship Company, Limited, had

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been incorporated in 1891 with a nominal capital of 750,000*l.* divided into 75,000 shares of 10*l.* each, but it was found impossible to raise sufficient money for the purposes of the company, and until 1911 the only shares issued were the seven qualification shares of the seven directors. In 1911 the Hamburg-Amerika Linie procured the alteration of the articles of association, and, four of the original subscribers to the memorandum of association being dead, appointed and qualified the directors of the company, taking from them an agreement, the terms of which are set out in the judgment, to conform to the instructions of the Hamburg-Amerika Linie. Five directors were appointed, of whom three were English and one was Russian. The fifth, Count Friedrich von Wengersky, was the German representative in London of the Hamburg-Amerika Linie, which, in the names of its nominees, acquired 2500 shares. By the agreement all dividends had to be accounted for to the Hamburg-Amerika Linie, to whom the *St. Tudno* was chartered at the rate of 330*l.* per month.

Upon the outbreak of war between Great Britain and Germany Count Friedrich von Wengersky ceased to be a director, and shortly afterwards the Russian director resigned, and the affairs of the company were managed by the English directors, who had no communication whatever with the Hamburg-Amerika Linie.

On September 21, 1914, the *St. Tudno* was requisitioned by the Admiralty for Government service, and on October 8 the company's solicitors wrote to the Director of Transports disclosing the fact that in 1911 the Hamburg-Amerika Linie "practically took over the company and reconstituted it," and that they had "appointed and qualified the directors of the company, taking from them an agreement to conform to their instructions." Thereafter, from time to time payments for the use of the *St. Tudno* were made by the Admiralty to the MacIver Steamship Company, Limited, without prejudice, in respect of the working expenses of the vessel. On December 24, 1915, the vessel was seized, and on January 3, 1916, a writ in prize was issued, claiming a decree that the *St. Tudno* belonged at the time of capture and seizure to enemies of the Crown, or alternatively to a company controlled by enemies of the Crown, and as such or otherwise was liable to confiscation as good and lawful prize.

1916. July 26, 28. *Sir Frederick Smith, A.-G.*, and *Ricketts*, for the Procurator-General. Although the *St. Tudno* nominally is owned by a British company, it is merely a marionette company entirely subordinated to the Hamburg-Amerika Linie, who are the real owners of the vessel. According to the judgment of the House of Lords in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)* (1), the material fact to be ascertained is, who are the persons in fact in control of the company, and if in fact the control is in enemies of the Crown the company cannot rely on the fact that it is nominally a British company. It is the duty of the Prize Court, especially in dealing with the case of a ship flying the British flag, to look beyond the nominal ownership. In *The Poona* (2), which was decided by the Prize Court before the decision of the majority of the Court of Appeal in *Continental Tyre and Rubber Co. (Great Britain) v. Daimler Co.* (3) was reversed by the House of Lords, the Court, while following the decision of the Court of Appeal as regards goods owned by a British company all the directors and shareholders of which were enemy subjects or domiciled in enemy territory, expressly reserved the question whether the same considerations would apply in the case of ships. See also *The Tommi and The Rothersand*. (4) In *The Polzeath* (5), a case brought on the Admiralty side of the Court's jurisdiction, the Court of Appeal held that under the Merchant Shipping Acts a ship was forfeit to the Crown because, although owned by a British company, the principal place of business of the company was in Hamburg. From the point of view of national security the Court should carefully scrutinize any attempt by a subterfuge to evade the plain policy of this country as expressed by the Merchant Shipping Acts. The *St. Tudno* is really an enemy-owned vessel and should be treated as such. [Reference was also made to *The Roumanian*. (6)]

C. R. Dunlop, for the claimants. Since the outbreak of war the directors of the MacIver Steamship Company, Limited, who have throughout behaved with the utmost propriety, have had no communication with the Hamburg-Amerika Linie, and nothing that

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(1) [1916] 2 A. C. 307.

(5) Ante, p. 241.

(2) (1915) 1 Br. & Col. P. C. 275.

(6) [1915] P. 26 ; [1916] 1 A. C.

(3) [1915] 1 K. B. 893.

124.

(4) [1914] P. 251.

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took place before the outbreak of war is material. The important date is December 24, 1915, the date of seizure, and at that time neither the vessel nor the company was controlled by the Hamburg-Amerika Linie. The only German director of the company had been struck off the register, and the mere fact that after the war benefit will accrue to the Hamburg-Amerika Linie by reason of the dividends the vessel will have earned is immaterial; a company is not bound to cease trading because after war the enemy will derive benefit: see per Lord Parker in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)*. (1) Under the judgment of the House of Lords in that case the Hamburg-Amerika Linie would cease to have any equitable interest in the vessel such as was presumed in the case of *The Venture* (2); and a German Prize Court would have rightly condemned the *St. Tudno* as a British vessel flying the British flag, notwithstanding the interest of the Hamburg-Amerika Linie. The tests for condemnation are (a) the flag and the ship's papers, and (b) the employment in which the vessel is engaged: see *The Tommi and The Rothersand* (3) and *The Pedro*. (4)

If the *St. Tudno* is to be treated as a German vessel she comes within the provisions of the Sixth Hague Convention, and as she was in the port of Southampton at the outbreak of war in charge of an English crew, and therefore could not have left for Germany, she should only be detained as in the case of *The Chile* (5), and not confiscated.

Ricketts, in reply, cited *The Vigilantia*. (6)

THE PRESIDENT (SIR SAMUEL EVANS). In this case the Crown ask for the condemnation of a paddle steamer, the *St. Tudno*, which, up to the time of the outbreak of war between this country and Germany, was at all material times used as a tender, in or about Southampton, for the liners of the Hamburg-Amerika Linie. The claim of the Crown is grounded on the contention that this steamer was enemy property; and that is the question which I have to determine in this case.

(1) [1916] 2 A. C. 307.

(2) [1908] P. 218.

(3) [1914] P. 251.

(4) (1899) 175 J. S. 354.

(5) [1914] P. 212.

(6) (1798) 1 C. Rob. 1; 1 Eng. P. C. 31.

The status of companies registered in this country, but controlled, and, so far as the ownership of the shares is concerned, in that sense owned, by enemy persons, has been much considered during recent months by the Courts of this country, and finally by the House of Lords in the case of *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)*. (1) The question which arose in that case was not precisely the same as that which arises here. The question in the case named was whether the composition and business of a company were such as to give it an enemy character, so that subjects of this country were prohibited from doing anything for it, or entering into any commercial intercourse with it, or in any way trading with it. Nevertheless, much light is thrown upon the position and status of companies of that description by the discussion and by the judgments in the case to which I have referred.

The steamship in the present case, the *St. Tudno*, belonged nominally to a British company registered in this country. In my opinion, in this Court of Prize I have a right to, and am bound to, look at something beyond the nominal ownership. The British company had, I think, three British directors and some British shareholders; but the documents which are now before me show clearly what the position of those directors, as directors, was, and what the position of those gentlemen as shareholders was.

By the agreement of October 24, 1911, nothing can be clearer than this, that the whole control and dominion over this ship were vested in and exercised by the Hamburg-Amerika Linie, which is well known to be a great German corporation with its centre of business in Hamburg. The directors were bound hand and foot by fetters of the most complete kind to do anything that might be required at the direction or by the instructions of the Hamburg-Amerika Linie. They were bound not only to act as directors in accordance with the instructions they received, but they were bound to remove themselves from the position of directors if the Hamburg-Amerika Linie gave directions to that effect.

The first clause of the agreement is this: "Each of the parties hereto of the first five parts in acting as such director will in all matters which shall come before the board or a committee of directors of the company follow the views and conform to the

(1) [1916] 2 A. C. 307.

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instructions of the Hamburg-Amerika Linie as the same may be communicated to the said parties individually or to the board by writing under the hand of Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, or verbally by Director Thomann or other director of the Hamburg-Amerika Linie, or Dr. Hopff, and will upon the like request resign his office." For the purpose in part of qualifying themselves as directors they acquired shares—fifty shares each. They did not pay a penny for those shares; they were at once called upon to execute and did execute blank transfers of them. Other clauses of this agreement provide for that, and also for what they were to do in case there was a declaration of dividend upon the shares. Clause 2 reads: "Each of the parties hereto of the first five parts will execute a blank transfer in the form hereto annexed of his qualification shares, and deposit such transfer and the certificates for such shares with the Direction der Disconto Gesellschaft, London, and hereby irrevocably authorizes the Hamburg-Amerika Linie to appoint at any time any person to apply to the Direction der Disconto Gesellschaft for the said certificates and transfers so deposited by him and to receive and give receipts for the same and to fill up the blanks in the said transfers in such manner as the Hamburg-Amerika Linie shall direct and to lodge the said transfer and certificates with the MacIver Steamship Company, Limited, for registration." Clause 3 deals with dividends, amongst other things. It reads thus: "Until the transfer of the said shares shall have been completed each of the parties of the first five parts, his executors or administrators shall stand possessed of the said shares in trust for the Hamburg-Amerika Linie and shall from time to time execute all rights incident to the ownership of the said shares in such manner as the Hamburg-Amerika Linie shall from time to time by writing under the hand of the Director Thomann or other director of the Hamburg-Amerika Linie or Dr. Hopff direct, and shall account to the Hamburg-Amerika Linie for all dividends and other sums receivable in respect of the said shares." On one occasion a dividend of $8\frac{1}{2}$ per cent. was declared and is duly recorded in the minute-book. Cheques were drawn in favour of the various directors for the dividend at that rate. Immediately the cheques were received by them, without even the formality of putting them through their

own banking account, they paid the cheques in to the Disconto Gesellschaft to the credit of the Hamburg-Amerika Linie. Not a single person other than the Hamburg-Amerika Linie has a penny of interest in this ship.

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Now, apart from technicalities, could anybody say that this ship belonged to a British company? If it did in name belong to a British company, that covering was the merest shell, and I must break through it in order to ascertain who the real owners of the ship were. There can be no doubt that the real owners are the Hamburg-Amerika Linie; and if the ship earned during the period of the war (as it has earned up till now) considerable sums, all those sums would have to be accounted for to that enemy company. I do not mention that as determining the question, because it may be that sums may be received in this country properly, which have to be accounted for to citizens of Germany after the war. I merely point it out in order to emphasize that the whole and sole ownership in the ship and everything appertaining to it was in every real and business sense in the Hamburg-Amerika Linie.

The ship was actually flying the British flag because she had been registered in the name of this company. Upon that a question might arise in a different form of proceedings, and in some sense arises in these proceedings, and that is, whether she was entitled to fly that flag. By s. 1 of the Merchant Shipping Act, 1894, "A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships) (d) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions." It is quite clear from what was said by the learned Lords in *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)* (1) that the place of the registered office of the company does not determine their principal place of business. That phrase, "the principal place of business," was not so much discussed in the House of Lords, but an analogous phrase was discussed, and that was the "residence" of a company. Upon that I will refer to two passages—one in the judgment of Lord

(1) [1916] 2 A. C. 307, 318, 319, 340.

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Atkinson, and another in the judgment of Lord Parker (representing himself and other Lords who agreed with him). Lord Atkinson said : “ Strange as it may appear, the minute-book of the company, showing, presumably, from what centre the business of the company was managed and directed, was not given in evidence before any one of the three tribunals. The embarrassing and, as I think, rather unfortunate result of this omission is that the full facts, showing in what country, England or Germany, lay the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs, were, save so far as revealed in the evidence of its secretary, never disclosed. These are, however, the very things which, for the purpose of income tax at all events, have been held to determine the place of residence of a company. . . . ” There the learned Lord indicated that the “ place where the real business centre from which the governing and directing minds of the company operated, regulating and controlling its important affairs,” was a test of residence. Lord Parker in his judgment says, in dealing with residence : “ My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company’s organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company’s acts and may invest it definitively with enemy character. . It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company.” Those words are so apt to the circumstances of this case that one would be inclined to think that Lord Parker had in his mind the facts either of this case or of similar cases—“ the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company.” All such powers in relation to this company were exercised from Hamburg by the officers of the Hamburg-Amerika Linie.

Accordingly, if the case came before me upon an application by the proper officials for the forfeiture of this ship on the ground that she

was not owned by a person qualified to own a British ship because the principal place of business was not in this country, I should hold in favour of the Crown and should order the forfeiture of the vessel. That is only another way of saying that I have come to the conclusion in this case that the name of the British company is a mere name, that to the very minutest particular there was no kind of beneficial ownership of this ship in anybody except the Hamburg-Amerika Linie, and that the owner's principal place of business was Hamburg.

The question, therefore, which I have to determine—namely, was this ship of enemy character, and enemy property, at the time of the seizure?—is one which I answer in the affirmative. She was. I only want to say one other thing in deference to the argument of counsel for the company. He says you must look at what this ship was actually doing after the outbreak of war. The actual control, wrongly or otherwise, was thereafter exercised by the English directors. That is not what I have to determine. What at the time of the seizure was the character of the vessel is what I have to find out. Then he said, “You ought also to have regard to the fact that the English directors actually chartered this ship to the Admiralty.” They did, and it is a peculiar circumstance, no doubt, that the ship was actually seized when she was employed by the Admiralty in this country. But that is not material to the question which I have to determine. Even if the Admiralty knew the facts, their acts would not bind this Court. But they did not know all the facts. The terms of the agreement, which is the all-important document regulating the position of the English nominees with reference to their German masters, were not known to the Admiralty.

The Crown are entitled to a declaration that this was an enemy ship. As to the claim for immediate condemnation, I doubt whether such a case was contemplated (you cannot possibly have in contemplation every case that may arise) when the Sixth Hague Convention was being framed. But the ship undoubtedly was an enemy merchant vessel (according to my finding) in a British port at the time of the outbreak of war within the meaning of that Convention, and I think I should be doing wrong in ordering her to be condemned out and out now. She must be treated like any other merchant ship actually in port at the outbreak of hostilities ;

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1916 and the proper order to make with regard to her is the order which
 THE was made in *The Chile*. (1) I make the order accordingly.
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Solicitor for the Procurator-General: *The Treasury Solicitor*.

Solicitors for claimants: *Pritchard & Sons*.

E. C. T.

1916
 Aug. 22.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE SYDNEY.

Prize Court—Prize Bounty—Destruction of Enemy Warship—Amount of Bounty distributable—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council of March 2, 1915.

By an Order in Council of March 2, 1915, pursuant to the provisions of s. 42 of the Naval Prize Act, 1864, His Majesty declared his intention to grant as prize bounty for distribution among such of the officers and crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement":—

Held, that, provided they form part of the crew and are in attendance in some form or other on the ship doing work in the capacity of members of the crew, it is not necessary for all the persons in respect of whom the prize bounty is payable to be actually on board the enemy ship at the beginning of the engagement.

MOTION FOR PRIZE BOUNTY.

On November 9, 1914, H.M.A.S. *Sydney* encountered the German cruiser *Emden* off the Cocos Islands in the Southern Indian Ocean, and, after an action which lasted an hour and forty minutes, the *Emden*, on fire and in a sinking condition, ran ashore and surrendered. Her full complement was 397, but at the time of the engagement fifty-two of the crew were on shore, where they had been sent in order to destroy the wireless telegraphic apparatus, and sixteen

(1) [1914] P. 212.

had been put as a prize crew on board a British collier which the *Emden* had captured some days previously and was using as an attendant ship. 1916
THE SYDNEY.

By Order in Council of March 2, 1915, His Majesty, in accordance with the provisions of s. 42 of the Naval Prize Act, 1864, declared his intention of granting as prize bounty for distribution among the officers and crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement."

Commander Maxwell Anderson, R.N., in support of the motion. The number of persons in respect of which bounty is claimed is 329, the number actually on board the *Emden* at the time of the engagement, but if s. 42 of the Naval Prize Act, 1864, can be construed so as to include men borne on the ship's books and doing work in connection with the ship, although not actually on board, the claimants naturally will be glad to receive bounty based on the larger number. [*L'Elise* (1) and *The Matilda* (2) were referred to.]

M. Shearman, for the Procurator-General. The claimants have not made out any case for payment on the basis of the larger number, and the Procurator-General does not admit that prize bounty is payable in respect of more than the 329 men actually on board the *Emden* when the engagement began.

THE PRESIDENT (SIR SAMUEL EVANS). I declare that the officers and crew of H.M.A.S. *Sydney* were present at the destruction of the *Emden*, an armed cruiser belonging at the time of her destruction to the German Empire.

I have to ascertain what prize money can be allowed at the rate of 5*l.* per head of the number of persons who have to be brought into the calculation. The full complement of the crew of the *Emden* was 397. Of these fifty-two had been sent ashore to destroy the telegraphic apparatus on land, and in that way they were doing part of the work that the *Emden* was commissioned to do. The object of their going on shore was to make it impossible, or difficult at any rate, for any communications to be sent from the land to the

1916 British cruisers which might otherwise come in the way of the
THE SYDNEY. *Emden*, as the *Sydney* did.

The President.

With regard to the other sixteen men, they were part of the crew of the *Emden* who were put on board the British vessel which the *Emden* had captured, and which she was using by compulsion as an attendant collier.

If I deduct these sixty-eight members of the crew, the number of persons on board the *Emden* which will regulate the amount of prize money will be 329, and the prize bounty will be 1645*l.* If, on the other hand, I take the full complement to be 397, the prize bounty will amount to 1985*l.*

In my view it would be placing too narrow a construction on the words of the Act of Parliament to hold that the persons in respect of whom prize bounty is payable must be actually on board the enemy vessel at the time of her destruction. If they are in fact part of the crew, and in attendance in some form or other, and doing work in the capacity of members of the crew of the enemy armed vessel, I think I am entitled to treat them as persons on board within the meaning of s. 42 of the Naval Prize Act, 1864.

I therefore have pleasure in allotting 5*l.* per head, calculated on the full crew of 397, and the prize bounty will be 1985*l.*

Solicitors for claimants : *Botterell & Roche, for Holt & Co., Navy and Prize Agents.*

Solicitor for the Procurator-General : *The Treasury Solicitor.*

E. C. T.

[IN THE COURT OF APPEAL.]

C. A.

THE APE.

1915

Feb. 11, 15, 16

[1913 F. 624.]

*Admiralty—Compulsory Pilotage—English Pilot—Foreign Crew—
Assistance from Ship's Officers.*

In an action of damage by collision the Court below found that both vessels were equally to blame, and that the plea of compulsory pilotage raised by the plaintiffs, by way of defence to the defendants' counter-claim, failed on the ground that the English pilot had not received from the Swedish crew the assistance to which he was entitled, for, in particular, the Swedish reports, received from forward, had not been repeated or interpreted to him, nor had the pilot's attention been drawn to the international rules of the road at sea in respect of the reduction of speed in fog:—

Held by the Court of Appeal (Buckley, Pickford, and Bankes L.JJ., assisted by two nautical assessors), that the plaintiffs were not liable for the damage sustained by the defendants' vessel, as interference with the pilot, in the way suggested, was not justifiable except in cases of extreme urgency.

Decision of Bargrave Deane J. reversed.

APPEAL, in an action of damage by collision, from a decision of Bargrave Deane J. (reported [1914] P. 94) rejecting the plaintiffs' plea of compulsory pilotage.

On October 9, 1912, about 7 A.M., the weather being foggy, with no wind, and the tide ebb of the force of about two knots, a collision occurred in the river Humber, about two miles above the Bull Light, between the *Falka*, a screw steamship belonging to Malmo in Sweden, of 1704 tons net register, proceeding up the river on a voyage from Riga to Grimsby laden with timber, and the defendants' screw steamship *Ape*, belonging to Yarmouth, of 466 tons gross register, engines of 85 horse power nominal, manned by a crew of eleven hands, and proceeding down the river in the course of a voyage from Hull to Yarmouth with a general cargo. Both vessels sustained

C. A. damage and, to prevent their sinking in deep water, both vessels
1915 had to be beached.

THE APE.

In the Court below the plaintiffs, the owners of the *Falka*, by their amended pleadings alleged that "if the collision and damage were caused or contributed to by any negligence on the part of the *Falka* (which is denied) such negligence was that of the pilot alone who was in charge of the vessel by compulsion of law." Bargrave Deane J. found that both vessels were equally to blame for (inter alia) excessive speed, and the learned judge further held that the plea of compulsory pilotage failed, for though, in the absence of manifest incapacity, a pilot should not be interfered with, it was the duty of the ship's officers to take care that the reports received from forward were understood by the pilot, and that his attention should have been drawn to the fact that, in the circumstances, the speed he was maintaining on the vessel was a breach of the International Regulations for Preventing Collisions at Sea.

Aspinall, K.C., and *Lewis Noad*, for the appellants (plaintiffs).

Bateson, K.C., and *D. Stephens*, for the respondents (defendants).

The arguments of counsel sufficiently appear from the judgment of—

1915. Feb. 16. BUCKLEY L.J. The learned judge in the Court below has found both vessels to blame, and has overruled the plea of compulsory pilotage; but counsel for the appellants, the owners of the *Falka*, have argued, first, that their vessel was not to blame, and, secondly, that, if to blame, the appellants are protected from liability for the damage sustained by the defendants' vessel by reason of compulsory pilotage.

Assuming, as this Court does, that the decision of both to blame is right, the question of compulsory pilotage remains. On this point the observations of Dr. Lushington in *The Argo* (1) and in *The Peerless* (2) are material as to not interfering with the pilot, except in cases of great urgency, and although the case of *The Tactician* (3) has been relied upon by counsel for the plaintiffs, as extending the duties of the master towards the pilot, it will be

(1) (1859) Swa. 462.

(2) (1860) Lush. 30.

(3) [1907] P. 244.

found on examination that the facts of that case show obvious imminent danger.

With regard to the facts of the present case it is said that the master or the mate on the bridge should have interpreted the reports made in Swedish from forward ; but there is no evidence that the pilot did not understand sufficient Swedish to know what the look-out had reported, and he did not ask those on the bridge with him for assistance in the matter.

Secondly, the learned judge in the Court below having found that, at the material time, there was fog, it is said that there was negligence on the part of the officers of the vessel in not calling the attention of the pilot to the International Rules under which, in such circumstances, the speed of ships is to be moderate ; but art. 16 as to stopping the engines, and navigating with caution until danger of collision is over, is not a peremptory rule, being limited by the words "so far as the circumstances of the case admit," and the evidence is that the pilot saw the vessel come through the fog as soon as anybody on board the *Falka* saw her ; and, on consulting our assessors as to an emergency having arisen rendering it the duty of the master or other officer on deck to interfere with the pilot, we have been advised that when the look-out reported this vessel on the starboard bow and the pilot did not stop, it was not the duty of the master to repeat the report to the pilot unless he thought that the pilot did not hear or understand it, and that the master need not have drawn the inference that the pilot had not heard or understood it when, in fact, there had been some six reports in respect of which he required no assistance. As a matter of seamanship reports of this nature are often not acted upon, as the navigating officer takes such a course as, in his discretion, he thinks right, and, in this case, it does not appear to me that there was any duty resting on the master or mate rendering it negligent on their part not to have repeated to the pilot the report made from forward, and, further, I think that the master was entitled to assume, as a matter of course, that the pilot knew the rules of the road.

In the result, in my opinion, the circumstances were not such that there was any negligence on the part of the master which would deprive the owners of the vessel of the benefit of the defence of compulsory pilotage.

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Buckley L.J.

C. A. PICKFORD and BANKES L.JJ. delivered judgments to the same
1915 effect.

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Appeal allowed.

Solicitors for appellants (plaintiffs) : *Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for respondents (defendants) : *Thomas Cooper & Co.*

T. L. M.

C. A.

[IN THE COURT OF APPEAL.]

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THE SARPEN.

March 22, 23,

24 ;

May 27 ;

June 5.

*Ship—Salvage—Tug requisitioned by Admiralty under Proclamation—
Right to Salvage—“ King’s ship ”—Ship “ belonging to His Majesty ”
—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557.*

By s. 557 of the Merchant Shipping Act, 1894, “Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service”

The Admiralty, acting under the powers conferred by a Proclamation of August 3, 1914, requisitioned the plaintiffs’ tug *Simla*, and sent her to Kirkwall Bay in the Orkneys. While stationed there the *Simla*, with the consent of the commander of the Northern Patrol, rendered valuable salvage services to the *Sarpen*, which had run upon the rocks in the vicinity. At this time no terms and conditions of employment of the *Simla* had been agreed to by the plaintiffs and the Admiralty, but terms were afterwards arranged :—

Held, that the effect of the requisitioning by the Admiralty under the Proclamation was not to make the *Simla* a ship “belonging to His Majesty” within the meaning of s. 557 of the Merchant Shipping Act, 1894, nor did the terms and conditions of the hiring have that effect, and that therefore the owners, master, and crew were entitled to prosecute a claim for salvage.

APPEAL from a decision of Bargrave Deane J. dismissing the plaintiffs’ claim for salvage.

The plaintiffs, the owners of the steam tug *Simla*, in consequence

of the receipt of a telegram from the Admiralty authorities at Sheerness Dockyard on July 30, 1914, requesting that certain named tugs (not including the *Simla*) should be despatched to Sheerness forthwith, and that, if not available, tugs of a similar description should be despatched, sent the *Simla* to Sheerness Dockyard, whence she proceeded to various places and eventually to Kirkwall Bay in the Orkneys. While the *Simla* was lying in Kirkwall Bay, the *Sarpen*, a Norwegian steamship having on board a cargo of wood pulp, ran ashore in foggy weather on the rocks at Papa Stronsa Island, which was a few miles from Kirkwall. The master of the *Simla*, hearing of the accident to the *Sarpen*, obtained permission from the commander of the Northern Patrol, under whose orders he was, to proceed to the *Sarpen* and, if necessary, to render her any assistance in his power to get her off the rocks. The *Simla* therefore proceeded to Papa Stronsa Island, and, after a part of the cargo of the *Sarpen* had been jettisoned, succeeded in towing her off the rocks and in bringing her into Kirkwall Harbour. The services were valuable.

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The plaintiffs by their reply specifically admitted that the *Simla* was under requisition by the Admiralty, but alleged that the requisition did not amount to a demise of the tug or a transfer of ownership to His Majesty, and that the plaintiffs were not by the fact of such requisition, or at all, deprived of their right to remuneration for the services rendered to the *Sarpen*.

The following are the terms of the Proclamation of August 3, 1914, under which the *Simla* was requisitioned by the Admiralty :—

“And whereas the measures approved to be taken require the immediate employment of a large number of vessels for use as transports and as auxiliaries for the convenience of the fleet and for other similar services, but owing to the urgency of the need it is impossible to delay the employment of such vessels until the terms of engagement have been mutually agreed upon : Now, therefore, we authorise and empower the Lords Commissioners of the Admiralty by warrant under the hand of their secretary or under the hand of any flag officer of our Royal Navy holding any appointment under the Admiralty to requisition and take up for our service any British ship or British vessel as defined in the Merchant Shipping Act, 1894, within the British Isles, or the waters adjacent thereto, for such

C. A. period of time as may be necessary on condition that the owners
1916 of all ships and vessels so requisitioned shall receive payment for
THE SARPEN. their use, and for services rendered during their employment in
the Government service, and compensation for loss or damage
thereby occasioned, according to terms to be arranged as soon as
possible after the said ship has been taken up, either by mutual
agreement between the Lords Commissioners of the Admiralty and
the owners or failing such agreement by the award of a board
of arbitration to be constituted and appointed by us for this
purpose.”

At the date of the judgment of Bargrave Deane J. no terms and conditions of employment had been settled between the Admiralty and the owners of the *Simla*.

By s. 557 of the Merchant Shipping Act, 1894, “(1.) Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service, and no claim for salvage services by the commander or crew, or part of the crew of any of Her Majesty’s ships shall be finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim is proved”

Bargrave Deane J. held that the *Simla* was a vessel in the service of the Crown and in the position of a King’s ship, and precluded by s. 557 of the Merchant Shipping Act, 1894, from making any claim for salvage, and that the master and crew of the vessel were not entitled to have their claim for salvage services finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim was proved, which had not been done. He therefore gave judgment for the defendants, but in case of a successful appeal he assessed the amount of salvage services rendered at 800*l*.

The plaintiffs appealed both as to the part of the judgment which held that the *Simla* was debarred, as a King’s ship, from making any salvage claim, and against the amount of salvage, 800*l*., provisionally awarded, as being insufficient.

After the trial an agreement was come to between the Admiralty and the owners by which the terms of the engagement of the *Simla* were settled as follows: The Admiralty were to pay an agreed sum per day for hire; the owners to pay the wages and the health insurance of the crew, to provide and pay for all stores and the necessary equipment for the proper and efficient working of the vessel, and to take all marine risks on the vessel and crew. The Admiralty to accept war risks on the vessel and crew and to provide coal. It was further provided that in the event of loss of time or prevention of the vessel working owing to deficiency of men or stores, defects or damage not due to a contingency coming under the category of war risks, payment of hire should cease until she be again in an efficient state to resume her service, and the cost of repair of such defects or damage should be an owners' charge. A charterparty was to be issued later.

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No charterparty had in fact been issued.

Dawson Miller, K.C., and *Raeburn*, for the plaintiffs. Sect. 557 of the Merchant Shipping Act, 1894, applies only to ships "belonging to His Majesty," and it cannot be successfully contended that the *Simla* was a King's ship. The section was intended to apply only to ships of the Royal Navy or ships belonging to the Crown, to which it applies in terms.

[SWINFEN EADY L.J. If the *Simla* had gone on a rock and been lost, whose loss would it have been?]

Undoubtedly, the owners'. To satisfy the section, the Crown must be the actual owners of the ship. There is here nothing equivalent to a demise of the ship to the Crown, and nothing to prevent the plaintiffs rendering salvage services and being paid for them. Sect. 557 does not apply to salvage of a foreign ship, as to which there is no duty (except by the comity of nations) to render salvage services.

The consent of the Admiralty is not required to the prosecution of the claim by the master and crew. [They cited *The Nile* (1); *The Bertie*. (2)]

D. Stephens and *John Aspinall*, for the defendants. The effect of the Proclamation is to create a demise of the ship to the Crown,

(1) (1875) L. R. 4 A. & E. 449.

(2) (1886) 6 Asp. M. L. C. 26.

C. A. and the use of the ship under the Proclamation confirms this view.
 1916 The terms are all arranged by the Proclamation except the term of
 THE SARPEN. payment. The case must be decided on the ground of what is the
 legal position of a ship under requisition where there is no charter.
 Further, assuming that the *Simla* belonged to His Majesty, the
 effect of the orders of the commander of the Northern Patrol was
 that she was under an official obligation to render the service, and
 the service was not voluntary.

If the defendants are liable to pay salvage, the amount provisionally awarded was ample.

Dawson Miller, K.C., in reply, cited *The Accomac* (1); *Sir John Jackson v. Owners of Blanche* (2); *The Iodine* (3); *Master of the Trinity House v. Clark* (4); *Christie v. Lewis*. (5)

Cur. adv. vult.

June 5. SWINFEN EADY L.J. read the following judgment:—
 The tug *Simla* rendered valuable assistance to the Norwegian steamship *Sarpen*, a vessel laden with dry wood pulp, when the latter was on the rocks at Papa Stronsa Island, one of the Orkney Islands, in the month of April, 1915.

This action was brought by the owners, master, and crew of the tug against the *Sarpen*, her cargo and freight, to recover salvage. The judge decided that the *Simla* was a vessel in the service of the Crown and in the position of a King's ship, and precluded by s. 557 of the Merchant Shipping Act, 1894, from making any claim for salvage, and that the master and crew of the vessel were not entitled to have their claim for salvage services finally adjudicated upon, unless the consent of the Admiralty to the prosecution of that claim was proved, which had not been done. He therefore held that the claim failed. In case there should be an appeal, the judge proceeded to consider what would be a proper amount to award for the salvage services rendered, if a claim could be maintained, and he fixed the amount at 800*l.* The owners, master, and crew of the tug appeal, and ask to have it determined that the ship was not, and ought not to be regarded as, a King's ship at the time when the

(1) [1891] P. 349.

(3) (1844) 3 Notes of Cases, 140.

(2) [1908] A. C. 126, 130.

(4) (1815) 4 M. & S. 288.

(5) (1821) 2 Brod. & B. 410.

services were rendered, and accordingly that the claim can be maintained, and that the consent of the Admiralty is not required for the due prosecution of the claim by the master and crew. The appellants also contend that, if they are entitled to recover salvage, the sum of 800*l.* determined by Bargrave Deane J. is inadequate compensation for the services rendered.

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In order to determine whether the tug is to be regarded as a King's ship, it is necessary to consider her position and the terms upon which she had been acquired and was held by the British Admiralty when the salvage services were rendered. She was sent to Sheerness Dockyard by her owners in response to a telegram from the dockyard authority of July 30, 1914, requesting that certain named tugs (not including the *Simla*) be despatched to Sheerness forthwith, but if not available, that tugs of similar description be despatched; the plaintiffs in their reply admitted that the tug *Simla* was under requisition by the Admiralty, and accordingly the learned judge said that he "accepted the position, which both parties seemed to agree to, that the requisition was duly effected, and when so requisitioned that the *Simla* went to Sheerness, and then to Kirkwall Bay, and lay in the harbour there under the direction of the naval harbour-master." I treat the matter on the same footing as by agreement it was treated in the Court below, and regard the tug *Simla* as requisitioned and taken up on the terms of the Proclamation of August 3, 1914. The Proclamation, however, contains a recital that, owing to the urgency of the need, it is impossible to delay the employment of the vessels taken until the terms of engagement have been mutually agreed upon, and it provides for terms being arranged as soon as possible after a ship has been taken up, either by mutual agreement between the Admiralty and the shipowner, or, failing such agreement, by the award of a board of arbitration.

Since the trial of the action before Bargrave Deane J. an agreement has been come to between the Admiralty and the tug owners settling the terms of the engagement of the tug *Simla*. By this agreement the Admiralty are to pay an agreed sum per day for the hire of the tug; the rate is framed on the following conditions:—Owners are to pay wages and health insurance of the crew, to provide and pay for all stores and the necessary equipment for the proper and efficient working of the vessel, and to take marine risks on the

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vessel and crew. Admiralty to accept war risks on the vessel and crew and to provide coal. In the event of loss of time or prevention of a vessel working owing to deficiency of men or stores, defects or damage, not due to a contingency coming under the category of war risks, payment of hire shall cease until she be again in an efficient state to resume her service, and the cost of repair of such defects or damage shall be an owners' charge. A charterparty to be issued later. These terms are retrospective and date back to July 30, 1914.

This Court, having now before it the terms so settled, is in a much better position than Bargrave Deane J. was to determine whether the ship is to be deemed to be "a ship belonging to His Majesty" within the meaning of s. 557 of the Merchant Shipping Act, 1894. By the terms of that section, where salvage services are rendered by any ship belonging to His Majesty, or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship, or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to His Majesty supplied in order to effect those services, or for any other expense or loss sustained by His Majesty by reason of that service. This provision is a re-enactment of s. 484 of the Merchant Shipping Act, 1854.

Where salvage services are rendered by a King's ship, no claim to salvage can be made in respect of the ship, but the commander and crew may prosecute a claim with the consent of the Admiralty (s. 557 of the Act of 1894). Previous to this provision and the corresponding enactment in the Act of 1854 there was in force an order of the Board of Admiralty of January 30, 1852, directing the officers of Her Majesty's ships not to claim reward for salvage services rendered to vessels in distress unless the service was one of real importance or was accompanied with hazard: see Kennedy on Civil Salvage, 2nd ed., p. 113.

The question is whether the *Simla* is to be considered a King's ship for the purpose of determining whether a claim for salvage can be made on behalf of the ship and her owners. In the case of *The Nile* (1) salvage services were rendered by the *Finisterre* and the officers of H.M.S. *Simoom*, and the *Nile* admitted liability for salvage and paid 1000*l.*, which was accepted, and the only question actually

(1) L. R. 4 A. & E. 449.

raised was as to the apportionment of the amount, and whether Captain Peile was entitled to a share as well as the naval officers who actually assisted at the operations. In that case the *Finisterre* had been chartered by the Government by a charter not demising the ship; all sea damage was at the risk of the owners of the ship, and the salvage services were outside the scope of the vessel's employment as a transport. Sir Robert Phillimore pointed out that the ship was never demised, and that there was no temporary transfer of her ownership to Her Majesty, and that her owners were therefore entitled to the ship's share of salvage remuneration. The inference from this is that if there had been an actual demise of the *Finisterre* to the Admiralty, and if sea damage had been at the risk of the Admiralty, the ship would have been for the time being "a ship belonging to Her Majesty" within the meaning of s. 484 of the Merchant Shipping Act, 1854 (now s. 557 of the Act of 1894).

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This is in accordance with the decision of the King's Bench in 1815 in *Master of the Trinity House v. Clark* (1), where Lord Ellenborough delivered the judgment of the Court, which determined that where the ship *Britannia* was under a time charter to the Crown, which amounted to a demise of the ship, a temporary ownership in the vessel passed to the Crown. In *Weir v. Union Steamship Co.* (2) Lord Davey, referring to this case, said that it was decided on very special circumstances and could hardly be a precedent for any other. But the passage which follows indicates that in his opinion, if the contract is one in which the ship is completely handed over to the charterers to be navigated by them at their own risk and responsibility, there would be a transfer of temporary ownership. A ship may belong to a person as "owner," although such ownership may be only temporary: see *The Lemington* (3); *The Ripon City*. (4)

In the case before us, however, it now appears that the tug *Simla* was taken by the Admiralty upon the terms of the owners paying wages and health insurance of crews, providing and paying for all stores and the necessary equipment for the proper and efficient working of the vessel, and taking the marine risk on the vessel and crew. When, therefore, the *Simla* was rendering (with the

(1) 4 M. & S. 288.

(3) (1874) 2 Asp. M. L. C. 475,

(2) [1900] A. C. 525.

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(4) [1897] P. 226, 242, 244.

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permission of the naval authorities) the services for which salvage reward was claimed, it was the owners of the *Simla*, and not the Admiralty, who were incurring risks of sea damage and injury to the vessel and her crew, and the Admiralty were not at risk in the matter. Now that the facts have been more fully ascertained, I am of opinion that the *Simla* cannot be regarded as a King's ship when rendering the salvage services, and that the ship is not prevented from claiming ordinary salvage remuneration by the fact of the vessel's hiring to the Admiralty, nor do the commander and crew require the consent of the Admiralty to the prosecution of their claim. I observe that Bargrave Deane J., after holding that the vessel was in the service of the Crown, added that without the sanction of the Admiralty she could not claim any salvage reward for salvage services. But if the ship was a King's ship, no claim to salvage could be made on behalf of the ship, whether with or without the consent of the Admiralty ; the claim must be limited to a claim by the commander and crew ; it is this claim which requires the consent of the Admiralty for its prosecution in the case of a vessel belonging to His Majesty.

It may be urged that the settlement of the terms of hire between the Admiralty and the tug owners, come to since the trial of the action before Bargrave Deane J., although operating retrospectively, ought not to prejudice the defence of the *Sarpen* to the demand for salvage. But the terms upon which the vessel was acquired by the Admiralty had been left open ; *prima facie* a ship rendering services such as the *Simla* rendered to the *Sarpen* would be entitled to a salvage award ; the burden of showing that the *Simla* was not so entitled was upon the *Sarpen* ; and if at the trial the terms of hire had not been sufficiently settled to determine the character and position of the *Simla*, the owners of the *Sarpen* might have applied for an adjournment of the hearing until either agreement or arbitration had determined whether the *Simla* was in the position of a King's ship. No adjournment, however, was asked for ; the evidence before Bargrave Deane J. was quite insufficient to establish that the *Simla* was in the position of a vessel belonging to His Majesty ; and the subsequent agreement shows that the *Simla* has not at any time since it was taken up acquired that character.

It was also contended on behalf of the *Sarpen* that there could

be no salvage award, as the services rendered were not voluntary on the part of the tug, since she had been directed by the naval officer in command at Kirkwall to proceed to the assistance of the *Sarpen*. But the services were rendered voluntarily as between the salvors and the salved, which is all that is material; the *Simla* owed no duty towards the *Sarpen*. In all cases of salvage by a King's ship, where the commander and crew are entitled to obtain a salvage award, they are acting under orders, given either in general instructions, or by a superior officer in the particular instance.

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With regard to the amount to be awarded, which Bargrave Deane J. assessed at 800*l.* if this Court should be of opinion that salvage could be recovered, I see no ground for differing from the learned judge on the question of amount. There does not appear to have been any misapprehension on his part as to the facts of the case or any error in point of principle.

In my judgment the appeal should be allowed and 800*l.* awarded to the salvors.

PICKFORD L.J. read the following judgment:—This is an action of salvage brought by the owners, master, and crew of the steam tug *Simla* against the owners of the steamship *Sarpen*, a Norwegian vessel, her cargo and freight, for services rendered while the *Sarpen* was ashore on Papa Stronsa in the Orkneys. The services are not denied, but the defendants allege that the plaintiffs are not entitled to claim salvage, because they are prohibited from doing so by s. 557 of the Merchant Shipping Act, 1894. This is not the form of the pleading, but it is the substantial question. It is also alleged that the services are not voluntary because they were rendered by the orders of the naval authorities.

It may be as well to dispose of this point at once. It rests, in my opinion, on no sound basis. The test of voluntariness is only applicable as between the salvor and salved, and if the services be voluntary in relation to the salved, i.e., not rendered by reason of any obligation towards him, it is quite immaterial that the salvor has been ordered by some one who has control of his movements to render them.

To decide the main question, it is necessary to see in what way the *Simla* was employed at the time of the services. She was owned

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by Mr. Watkins and was placed at the disposal of the Government in consequence of two telegrams received on July 30, which requested certain named tugs or others of a similar description to be sent to Sheerness. The Proclamation under which vessels were requisitioned was issued two or three days later, and it is admitted by the reply that at the time of the services the *Simla* was under requisition, but it is denied that such requisition amounted to a demise of the tug or a transfer of ownership to His Majesty. So far as the facts were known at the trial and on the argument before us, they were that the owners were to be paid a monthly hire, the amount of which was not ascertained, that they provided and paid the master and crew and provided the stores and provisions, bunker coal being supplied by the Admiralty.

I think that the learned judge described the position correctly when he said that the tug was in sole employment of the Crown, which had actual discretion as to her use, and it was necessary to obtain the permission of the Admiralty authorities before she could go out and render salvage services. I cannot, however, agree with him when he says that under those circumstances she could not claim any salvage reward for salvage services without the sanction of the Admiralty. The sanction of the Admiralty has nothing to do with the claim by the owners of the tug ; if they come within the provisions of s. 557 of the Merchant Shipping Act, 1894, no claim can be made by them at all either with or without such sanction ; if they do not come within the provisions, no such sanction is necessary. In order to defeat their claim it must be shown that the *Simla* was a ship belonging to His Majesty within the meaning of that section. The section is as follows : [His Lordship read the section and proceeded :] Probably the reason of the provision is that it is not considered right that risk or loss to property provided by the public should be paid for by a member of that public. It is true that this reason does not apply to risk and loss occasioned by services to foreigners, and it was contended before us that the section must be limited to services rendered to British ships or cargo, but I see no such limitation in the section, and it was probably extended to foreign ships by the comity of nations.

But to bring the salving vessel within the section she must belong to the Crown. It is not enough that she is chartered by the Crown,

which has the sole directing power over her, and that she cannot render salvage services without the Crown's consent. She does not necessarily belong to the Crown in that case any more than a vessel under charter not by way of demise to any one else belongs to the charterer: see *The Nile* (1) and *The Bertie* (2), with which I agree. Those cases are not authorities which govern this case; the salving vessels were under charter as transports only and not hired for any purpose which the Crown required, and they were not, so far as I can tell, under requisition, but I think they are authorities with which I agree that the owners of a vessel are not excluded from the right to salvage because she is in the service of the Crown and cannot render such services without its consent and the services are rendered under the instructions of the naval authorities. It is necessary to see if the fact of being under requisition makes any difference. In my opinion it does not necessarily do so.

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I do not deny that there may be a requisition under such terms as to give the Crown the dominion as well as the control of the ship, and it may be that in such a case she may be said to belong to the Crown, although not in the ordinary sense belonging to it. But I am of the same opinion that I expressed in *The Broadmayne* (3), that the word "requisition" does not necessarily connote such a state of things; it means that the Crown has the right to require the services of the ship without the consent of the owner, but it does not define the terms upon which the Crown may see fit to take those services. It is well known that some vessels are employed under requisition on terms of charterparties and some are not, that the terms of the charterparties are not always the same, and a case was mentioned at the Bar in which express terms were made entitling the tug so requisitioned to the benefit of salvage.

The Proclamation under which this ship is to be taken to be requisitioned seems to me to contemplate that all vessels will not be requisitioned on the same terms; it is as follows: [His Lordship read the terms of the Proclamation as hereinbefore set out.] It may very well be that the words "according to terms to be arranged" strictly and grammatically refer only to payment for services and compensation, but it is obvious that in arranging such payment

(1) L. R. 4 A. & E. 449; 3 Asp. M. L. C. 11.
(2) 6 Asp. M. L. C. 26.
(3) [1916] P. 64.

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1916 hiring, e.g., whether the owner or the Crown pays the crew, on
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Pickford L.J. have pointed out, it is well known that the Crown does under
 requisition hire the services of the ships on different terms as to
 such matters. The Crown cannot be forced by arbitration to accept
 any particular conditions, but it can and does agree to such con-
 ditions, and then the only question for arbitration is : given those
 conditions, what is the proper amount to be paid ?

In my opinion, where there is a hiring under requisition, as in this case, on terms to be settled after the hiring, the question of whether the requisitioned ship is a ship belonging to the Crown cannot be ascertained until those terms are settled. I do not think in this case there was a taking over of the absolute dominion of the vessel subject to being afterwards altered at the will of the Crown, but a taking over on terms which the Crown had not then settled and which when settled might or might not confer such dominion. In this case there were not, in my opinion, materials before the Court on which it could come to the conclusion that the *Simla* was a ship belonging to His Majesty, and I think, therefore, that the plaintiffs are entitled to an award. On Mr. Watkins' evidence the tug belonged to him and was entitled to salvage reward, and to show that the Crown was employing her under terms which were not ascertained was not sufficient to displace that *prima facie* case.

It is to be noticed that the Admiralty have in no way interfered in fact ; so far as any intelligible meaning can be given to the communication from the Transport Department, they seem to be willing that the plaintiffs should recover salvage so long as it is not against Crown property, and the defendants have not taken the trouble to obtain any evidence from the Admiralty as to anything. I think, therefore, that upon the evidence before the learned judge the plaintiffs were entitled to succeed. The defendants would, I think, have been entitled to object to judgment being given against them while the terms were unsettled and to ask for an adjournment until it was decided what they were, but they did not do so.

We have, however, since the case was argued had sent to us in substance the terms agreed between the plaintiffs and the Government. They are finally to be embodied in a charterparty, and that

has not yet been done, but they have been accepted by the parties as substantially correct, and we have heard argument on them on that basis. Those terms have been read. They are in effect a hiring by the Government which is not a demise of the vessel, and leave the marine risk to fall upon the owners, and they take effect from July, 1914. The result is that when the salvage services were rendered the tug was employed under terms which did not constitute her a ship belonging to His Majesty, and therefore her owners, master, and crew were entitled to recover a salvage reward.

There remains to be considered the amount of the award. The learned judge assessed it at 800*l.* in case the plaintiffs were entitled to recover, and the plaintiffs have appealed on the ground that the amount is insufficient. This Court is always loth to interfere with the amount of salvage awards even where it might possibly not take exactly the same view as the Court below, and I do not see in this case sufficient grounds for interfering with the discretion of Bargrave Deane J.

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BANKES L.J. read the following judgment:—This is an appeal from a decision of Bargrave Deane J., who decided against the claim of the owners, master, and crew of the steam tug *Simla* for salvage services rendered to the Norwegian steamship *Sarpen*. The decision proceeded entirely upon the ground that the *Simla* was “a ship belonging to His Majesty,” and that the claim of the owners must therefore be disallowed; and that so far as the claim of the master and crew was concerned, the consent of the Admiralty not having been obtained for the prosecution of the claim, that claim must be disallowed also. The rule restricting any claim for salvage by a vessel belonging to His Majesty appears to be of very old standing. It was referred to in the case of *The Iodine* (1) by Dr. Lushington in the year 1844 in the following terms: “Observations have been made in the argument respecting one of Her Majesty’s vessels preferring a claim of this nature. I thought that question had long ago been settled; for from the very earliest date of my experience as an advocate, as far back as 1808, I thought the opinion expressed by Lord Stowell had decided this question. I apprehend that where assistance is rendered by any vessel belonging to Her Majesty,

(1) 3 Notes of Cases, 141.

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the following principles are to be applied: that where a service is done, and there is personal risk and labour, Her Majesty's officers and seamen are entitled to be rewarded precisely in a similar manner, on the same principles, and in the same degree, as where any other persons render that service. But, with regard to the use of the vessel, a different consideration would apply, and a less remuneration would always be made, on account of the vessel being the property of the country, and the property of owners under these circumstances never being risked." Ten years later the rule as extended was incorporated in the Merchant Shipping Act, 1854 (ss. 484, 485), and is now to be found in s. 557 of the Merchant Shipping Act, 1894. It has never been expressly decided what constitutes a vessel belonging to His Majesty, so as to render the owner incapable of claiming for salvage services. The question can of course only arise in relation to vessels engaged in Government service and privately owned or owned by the Government of some colony or dependency. The question was discussed in the cases of *The Cargo ex Woosung* and *The Dalhousie* (1) with reference to vessels belonging to the Bombay Government. The most instructive case on the point to which we have been referred is, I think, that of *The Nile*. (2) That case raised the question as to whether the owners of the steamship *Finisterre* were entitled to salvage. The vessel was at the time engaged under charter in Her Majesty's transport service. In dealing with the question Sir R. Phillimore says this (3): "Having reference to these documents, I am of opinion that the *Finisterre* was never demised . . . to Her Majesty; that there was no temporary transfer of her ownership to Her Majesty; and that her owners are entitled . . . to her share of salvage remuneration. I think, however, that she was so far under the control of the senior naval officer . . . that on the one hand she could not have acted as salvor without his permission, though, on the other hand, she could not have been ordered by him to perform this service, —which was not, in my judgment, within the terms of the charter." In this passage Sir Robert Phillimore clearly indicates that in his opinion if there had been a temporary transfer of ownership the *Finisterre* would have become for the time being, and for the purpose

(1) (1876) 1 P. D. 260, 271.

(2) L. R. 4 A. & E. 449.

(3) L. R. 4 A. & E. 455.

of the Merchant Shipping Act and the earning of salvage, a vessel belonging to Her Majesty. In this view I agree ; and it is therefore unnecessary to consider the cases, to several of which we have been referred, in which it has been held that for certain purposes a vessel may be considered as having a dual ownership—the ownership of what I may call the actual owner, and the ownership of the temporary owner. In the present case there is no question that the actual owners of the ship are the plaintiffs in the action. The only question is whether the requisitioning of the *Simla* by the Government placed her for the time being in the temporary ownership of the Government so as to constitute her a vessel belonging to His Majesty, and as such disentitled to earn salvage. I should entertain no doubt at all on this question had the requisition been a formal unqualified exercise of the Royal prerogative. Such an exercise of the prerogative must, I think, be interpreted as a taking over of a vessel in the fullest possible sense, which would include the claim to exercise and the exercising of the rights of owner to the full extent. The difficulty in the present case arises from the circumstances under which the *Simla* was taken for Government service and the terms of the Proclamation of August 3, 1914. The only documents which passed between the Government and the owners before and in reference to the taking of the *Simla* were two telegrams, both dated July 30, in which the Admiralty requested the owners to send certain named tugs or tugs of similar description to Sheerness. In pursuance of this request the *Simla* was sent with others, and she has since been continuously retained in Government employ. For the purposes of this action the parties are agreed that the *Simla* must be treated as having been requisitioned under the Proclamation, although no warrant was ever issued for that purpose. It becomes, therefore, very material to consider the terms of the Proclamation. The Proclamation confers upon the Lords Commissioners of the Admiralty the power to requisition and take up for the service of His Majesty any ship as defined by the Proclamation for such period of time as may be necessary, but only on condition that the owner shall receive payment for the use, and for services rendered, during the employment in Government service, and compensation for loss or damage thereby occasioned according to terms to be arranged as soon as possible after the ship has been

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1916 language appears to me to give the Admiralty a wide discretion in
THE SARPEN, arranging terms with an owner of a requisitioned vessel. The pay-
ment to be made is to depend upon the use to which the vessel
Bankes L.J. is put, or the services which she is required to render, and the terms
of employment may therefore extend from the full requisitioning
of the vessel upon terms at least as extensive as a demise of the
vessel to the mere occasional employment of the vessel to render some
specified and intermittent service. The language of the Proclama-
tion appears to me to indicate that it was intended to provide
for the possibility of there being cases in which the continuous use
of the vessel might not be required, but that she might be required
to render certain services only at stated periods, leaving her free
for her owners' purposes at other times, and that other terms might
be agreed upon which might affect the amount of compensation
which an owner could properly claim. As an instance, I cannot
think of a better illustration than the present, where conceivably it
may be in the interest of every one that the *Simla* should be at
liberty to undertake salvage services for reward if and when the
Admiralty authorities thought it right to give her permission to
undertake them. If this was permitted, the rate of payment to
the owners would presumably be less than if it was not permitted,
while the Admiralty would be free to give or refuse permission as
it suited their purpose. This question of the right to charge for
salvage services must necessarily, as it seems to me, come up for
settlement if and whenever the terms of payment are discussed
between the Admiralty and the owner of the requisitioned ship.
In the present case when the matter was before the Admiralty
Court the question of the tug's position and the terms of payment
had not come up for discussion. I certainly am not prepared to
assume, and I do not think that the learned judge was right in
assuming, either that the effect of a requisition under the Proclama-
tion was ipso facto to put the *Simla* into the class of a ship "belong-
ing to His Majesty," or that the terms which would eventually be
mutually agreed, or settled by arbitration, must necessarily involve
a transfer of the temporary ownership to the Crown. During the
argument before this Court Mr. Dawson Miller mentioned the fact
that since the case was before the Admiralty Court terms had been

agreed upon between the owners and the Admiralty. We were not told the terms at the time, but the Court has been furnished at its request with a copy of the correspondence which has passed, and counsel have been further heard upon it. It now appears that one of the terms which have been agreed is that marine risks are for the owner, and war risks only for the Crown. In my opinion this agreement concludes the question as to the real position of the *Simla* with regard to salvage whilst she remains under requisition, and it is no longer possible to contend that she was at the time the salvage services were rendered a ship belonging to His Majesty. Apart from the question of the agreement, however, the evidence before the learned judge was not in my opinion such as to justify a finding that the *Simla* was at the time the salvage services were rendered in the position of a ship "belonging to His Majesty." I regard her at that time as only conditionally requisitioned, that is to say, that she was requisitioned upon terms which might or might not place her in the position of a "ship belonging to His Majesty," but as the terms had not at that time even come under discussion she had not become fixed with the disabilities, so far as salvage services are concerned, of one of His Majesty's ships. Under these circumstances I consider that the appeal on the question of liability should succeed.

The amount fixed by the learned judge is, I consider, low, but not so low as to justify any interference by this Court.

Appeal allowed.

Solicitors for plaintiffs : *Clarkson & Co.*

Solicitors for defendants : *Thomas Cooper & Co.*

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TURNER v. TURNER.

Divorce Petition—Respondent on Active Service Abroad—Substituted Service of Citation and Petition—Order—Practice.

The practice laid down by the President (Sir Samuel Evans) in regard to service of decrees for restitution of conjugal rights upon respondents engaged on active service abroad does not apply to the service of citations and petitions in suits for dissolution of marriage; although it is recognized that where, after service of the citation, it appears that a respondent desires to contest the suit, the further proceedings may have to abide his return to this country, on leave or otherwise.

Where personal service of a citation and petition for divorce could not be effected upon a respondent, who was serving as a seaman on board one of His Majesty's ships in the Far East in time of war, the Court directed that service might be effected by sending the documents in a prepaid registered letter addressed to the respondent, and fixed the time for appearance at one hundred days.

Mason v. Mason [1915] W. N. 200 and *Lang v. Lang* [1915] W. N. 236 distinguished.

THIS was a petition by the wife for dissolution of marriage on the grounds of desertion and adultery.

The respondent was a seaman, serving on board one of His Majesty's ships in the Far East.

The petitioner applied on motion to one of the registrars during the Long Vacation asking that service might be allowed by prepaid registered letter addressed to the respondent on board his ship.

The registrar refused the application.

On October 18 Shearman J. gave leave to enter the motion for rehearing.

J. Harvey Murphy, on behalf of the petitioner, now moved the Court, and mentioned that the registrar appeared to base his decision on *Mason v. Mason* (1) and *Lang v. Lang* (2), both of which were, however, restitution cases and therefore distinguishable. He quite recognized that if, after being served, the respondent were to intimate that he desired to contest the suit, any further proceedings

(1) [1915] W. N. 200.

(2) [1915] W. N. 236.

would have to remain in abeyance until the respondent could get leave from his naval duties. But if, on the other hand, the respondent had no intention of defending, it would be a great hardship to prevent the petitioner from proceeding.

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v.
TURNER.

SHEARMAN J. This is a motion for leave to effect service of the citation and sealed copy of the wife's petition for divorce by registered letter addressed to the respondent, who is now apparently serving on board one of His Majesty's ships in the Far East.

The registrar, who refused the application when it came before him in the Long Vacation, seems to have considered himself bound by two cases, namely, *Mason v. Mason* (1) and *Lang v. Lang*. (2) But, on looking at the notes of those cases, I find that they both referred to a different matter, namely, the service of decrees for restitution of conjugal rights, those being decrees which ordered the respondents to do something which, in the actual circumstances, it would be impossible for them to comply with. Under those circumstances, it was reasonable that the service of the decree or order should be made the subject of some further application.

Here, however, the Court is considering the case of a man who, it is alleged, has deserted his wife and has been committing adultery in Japan.

It is conceded that the matter cannot rightly be disposed of in his absence, if he should intimate his wish to contest the petition. But if nothing short of personal service is to be allowed, great injustice might be done.

I am not unmindful of the old saying "Inter arma silent leges"; but, even when war is going on, I think justice can still be done. In my view it can be done in such a case as this. That is why I make the order, which is that personal service be dispensed with and that the respondent be served by prepaid registered letter addressed to him on board his ship. The time for entering an appearance, and which will be notified in the citation, will be one hundred days.

Solicitors: *Nye, Moreton & Clowes.*

(1) [1915] W. N. 200.

(2) [1915] W. N. 236.

H. D. G.

1916
Oct. 30.

MACONOCHIE *v.* MACONOCHIE.

MACONOCHIE *v.* MACONOCHIE AND BLAKE.

Divorce Practice—Wife's Costs—Husband dead before Trial—Application against Executrix dismissed—Costs.

Upon the death of a husband, a party in a consolidated matrimonial suit, the causes of action being purely personal, the suit abates; and the Divorce Division has no jurisdiction to entertain an application against the legal personal representative of the deceased husband in respect of taxation and payment of the wife's costs of suit, where no taxation or order for security of those costs had been applied for or made by the wife against the husband during his lifetime.

Cunningham v. Cunningham (1897) 77 L. T. 405 distinguished.

THIS was a summons adjourned into Court for argument.

It was taken out by the solicitors for the wife calling upon the executrix of the husband to show cause why the wife should not be held entitled to tax her costs against the estate of the husband.

The first suit was commenced by the wife on February 29, 1916, for restitution of conjugal rights.

The answer and cross-petition of the husband were founded on allegations of adultery, and were filed on March 14, 1916.

On April 3, 1916, the suits were, by consent, consolidated.

Particulars were delivered on the application of the wife, who on May 24, 1916, filed her answer to the husband's petition, in the form of a simple denial, and on May 31 a similar reply to the husband's answer in the wife's suit was filed by her.

The named co-respondent also filed an answer, dated May 24, 1916, denying the charge made against him by the husband.

In June, 1916, while on active service in France, the husband, who was an officer in His Majesty's Army, made a will leaving everything to his sister and appointing her sole executrix. He died on July 2, 1916, while on active service.

On September 7, 1916, probate was granted to the executrix, the estate being sworn at 244*l.* 19*s.* 11*d.*

J. H. Watts, for the wife. As neither of the suits has been dismissed, the legal personal representative of the husband is liable : *Cunningham v. Cunningham*. (1)

[SHEARMAN J. In that case there was a sum in Court. Have you looked at the common law case of *Brown v. Feeney*? (2)]

A more recent case, *In re Stillwell*, (3), is an authority for saying that where an order has been made, in a matrimonial suit, for alimony, the widow of the man against whom the order was made may recover against his estate, if solvent, any arrears of alimony which had accrued due at the time of the man's death. In that case the husband left his property away from his wife, and the husband's executor himself raised the point by taking out an originating summons in the Chancery Division to have his position ascertained. That, however, is only a matter of procedure, and makes no difference as to the principle.

[SHEARMAN J. I do not want to hear you on the question of necessities, as it is not for me, sitting here, to determine the question of liability for necessities at common law. But, where you have a personal action which has abated through the death of one of the parties, can you obtain or enforce an order for the surviving party's costs against the legal personal representative of the party who is dead?]

[Counsel referred to Lush on the Law of Husband and Wife, 3rd ed., p. 428.]

In the present case, if the respondent's then advisers had not unduly delayed applying to the Court for leave to proceed without citing any co-respondent in respect of the charge of adultery with an unknown man, an order for the wife's costs might have been applied for and obtained before the death of the husband.

R. M. Middleton, for the executrix of the respondent (husband), was not called upon to argue.

SHEARMAN J. This is an interesting question, but I am quite clear as to what my decision must be.

These were two matrimonial suits which were consolidated by order. Under the practice the wife would, in the ordinary course,

(1) 77 L. T. 405.

(2) [1906] 1 K. B. 563.

(3) [1916] 1 Ch. 365.

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CHIE

v.

MACONO-
CHIE,

MACONO-
CHIE

v.

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CHIE
AND BLAKE.

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v.MACONO-
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CHIE
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Shearman J.

probably get an order for her costs, but before any application for those costs has been made the husband dies.

No authority has been cited to show me that these proceedings, which are founded on statute or rest upon the old ecclesiastical practice, are not personal actions.

The result then is that when one of these parties dies the action abates : it comes to an end ; it is dead and done with.

These personal actions then having abated, no one can come to the Court and make an application in these actions. There is one exception to the rule, and that is where there are funds already in Court.

In *Brown v. Feeney* (1) the Court of Appeal held that, although the action was dead, the Court had jurisdiction to deal with funds in its hands, and that it was better to deal therewith in that action.

The result in the present instance being that the actions have come to an end, the wife, the surviving party, cannot bring anybody here to listen to her application for costs incurred in these actions, and there is no power to make an order.

I say nothing against the suggestion that she might possibly enforce payment of her costs of suit as necessities if she were to take steps elsewhere ; but I am satisfied that she cannot do so here.

The result is that her summons must be dismissed with costs.

Solicitors for wife : *Bevan & King*.

Solicitors for respondent's executrix : *E. F. & H. Landon*.

(1) [1906] 1 K. B. 563.

H. D. G.

IN THE HIGH COURT OF JUSTICE.
 PROBATE, DIVORCE, AND ADMIRALTY DIVISION.
 ADMIRALTY.

1915
 Sept. 22, 23,
 24;
 Oct. 12

(IN PRIZE.)

THE MANNINGTRY.

[1915, No. 211.]

Prize Court—British Ship—Enemy Cargo—Partnership—Joint Adventure—Division of Profits—Non-severance of Business Relations by British Shareholders—Freight.

Before the outbreak of war, a British steamship left an Australian port for Antwerp with cargo deliverable to order, and, after the outbreak of war, put into Torbay for coal. As the ship's papers showed that the charterers were a German company, the Customs officers at Brixham seized the cargo on suspicion that it was enemy owned, and a writ was duly issued.

Of this cargo a portion was claimed by a British company on the ground that they had taken up the shipping documents, accepted the shippers' drafts for the value of the goods, and paid the freight. A Belgian company also claimed as owners if it should be held that the property had passed from the British company; but the President condemned this portion of the cargo as being, on the evidence, at the time of seizure, enemy property belonging to the German charterers, the British company being merely pledgees of the documents and, therefore, in accordance with the decision in *The Odessa* [1915] P. 52, not recognized in a Prize Court.

Another consignment was claimed as to one fourth share each by the British company, the Australian Metal Company (a registered British company, which shipped all the goods; but the majority of whose shareholders were German), and a British partnership, as being members of a "pool" along with the German charterers:—

Held by the President (Sir Samuel Evans), on condemning also this consignment as enemy property, that the German company were, at the time of seizure, the owners, notwithstanding that they had to account for the ultimate profits to the three other members of the pool, and, if the pool were deemed a partnership of three British partners and one enemy partner, so that the consignment was the joint property of the four partners, it was incumbent on the three British partners to show (which they had not done) that they had taken prompt steps to sever their business relationship with the enemy partner on the outbreak of war, just as it rests

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upon a resident in hostile territory to prove that he was not there *animo manendi*: *The Bernon* (1798) 1 C. Rob. 101.

A British banking company innocently and honestly paid freight under the impression that they were entitled to have the goods delivered to them as holders of the bills of lading, and in ignorance of the fact that the goods had already been seized as prize on behalf of the Crown:—

Held by the President, that the payment must be treated as made under a mistake, and the money repaid to the bank out of the proceeds of sale of the condemned cargoes.

APPLICATION by the Procurator-General, on behalf of the Crown, for the condemnation, as enemy property, of two consignments of metals, namely, 1811 tons of zinc concentrates and 1006 tons of leady concentrates, consigned to the order of the shippers or their assigns at Antwerp, being a portion of the cargo shipped, before the outbreak of war, by the Australian Metal Company, Limited, at Port Pirie, South Australia, on the British steamship *Manningtry*.

Claims for freight were also dealt with, including a claim for 3100*l.* in respect of freight paid by the Union Bank of Australia under a mistake.

The vessel put into Torbay for coal, and, on September 23, 1914, the ship's papers showing that the charterer was the Metallgesellschaft of Frankfurt, the cargo, on suspicion of its being enemy owned, was formally seized as prize by the Customs officers.

The following statement of facts, with reference to the zinc concentrates, is taken from the judgment of the President:—

“Five commercial bodies or firms come into play in the intricate transactions which have had to be investigated. They are the Metallgesellschaft, a very large German metal company with its head office at Frankfurt-on-Main; Henry R. Merton & Co., Limited, of the city of London, a registered British company; the Australian Metal Company, Limited, of London and Melbourne, also a registered British company; Messrs. Vivian Younger & Bond, of London, a British partnership firm; and the Compagnie des Minerais, a société anonyme, of Liège, Belgium.

“A very intimate and complicated inter-relationship existed between these various companies and firms in respect of the directorships, shareholdings, and general business relations. Detailed particulars were given in evidence. It would not conduce to lucidity

or serve any useful purpose, to recount these details. Suffice it to say, at this point, that the hand of the Metallgesellschaft was to be seen, and its powerful influence exhibited, at all times and places. The goods were seized in the port of Brixham on September 23, 1914. The claims were filed at various times and in varied forms.

“ It is necessary to examine them, and to bear in mind by whom, for whom, and on what grounds they were made.

“ On November 17, 1914, the first formal claim was put in by Henry R. Merton & Co., Limited. They claimed all the goods—the zinc and lead concentrates—as ‘ the true, lawful, and sole owners ’ at the time of the seizure, because they had accepted the shippers’ drafts for the value of the goods, taken up the shipping documents, and paid the freight.

“ Amongst the grounds of the claim are statements to the effect that the zinc concentrates were intended to be sold to the Compagnie des Minerais, but that as this company had not paid for them, the property belonged to the claimants; and that the lead concentrates were consigned to the Metallgesellschaft for sale; and had in fact been sold by the Metallgesellschaft before seizure to a Belgian company at Hoboken. It was also stated that the Metallgesellschaft were to sell the lead concentrates for the joint account of the Australian Metal Company, Vivian Younger & Bond, the Metallgesellschaft, and Henry R. Merton & Co., Limited. The claim does not state by whom the zinc concentrates were sold or ‘ intended to be sold ’ to the Compagnie des Minerais.

“ On January 25, 1915, Henry R. Merton & Co., Limited, filed their second claim. The grounds are somewhat amplified, but not substantially different. They claimed again as the owners of the goods. On June 29, 1915, a third claim was filed on behalf of three claimants—Henry R. Merton & Co., Limited, the Australian Metal Company, Limited, and Vivian Younger & Bond.

“ Mertons, Limited, again claim the whole on the same grounds as before. In the alternative they, and the Australian Metal Company and Vivian & Co. claim one-fourth share each in the lead concentrates, as three members of a ‘ pool designated the 4/4 account,’ of which the other member was the Metallgesellschaft. The claims as to the zinc concentrates were formulated as before.

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Finally, on August 12, 1915, the fourth claim was filed. In this the Compagnie des Minerais claim the zinc concentrates as the owners, 'if it should be held that the property in same had passed from the said Henry R. Merton & Co., Limited.'

"The cases of the zinc cargoes and the leady cargoes were put forward separately and dealt with on different grounds, although in the maze they not infrequently run into each other.

"The Australian Metal Company, Limited, who shipped all the goods, had been brought into existence and established by the Metallgesellschaft, Mertons, Limited, and Vivian & Co. in 1897. For the circumstances, reference is made to three agreements bearing date December 16, 1897.

"These agreements comprised the business in all ores and metals; The business was known as that of the 3/3 account. It was alleged that the business in zinc ores was some time afterwards and many years ago excluded from that account, and transferred to the Compagnie des Minerais; and that it became a separate business, between the Australian Metal Company, Limited, and the Compagnie des Minerais of Liège, the Australian company buying the zinc ores in Australia and sending them over to the Compagnie des Minerais as purchasers in Belgium.

"No contemporaneous documents purporting to establish any such transfer was produced, except a letter of March 16, 1903, from the Metallgesellschaft to the Australian company. This is wholly insufficient for the purpose. It appears to refer only to the share of the Metallgesellschaft in one particular contract between the Sulphide Corporation and Beer, Sondheimer & Co., which contract was never produced. It was argued that the letter referred to all the shares in the 3/3 account; but that is a strained construction, and is inconsistent with the statement of Mr. Urruty (one of the directors of the Compagnie des Minerais) in paragraph 4 of his affidavit. There was, no doubt, difficulty in producing any documents from Liège, but there was none in the way of the production of documents from the offices of Mertons, Limited, or the Australian company, or Vivian & Co. No witness was called connected with either of these bodies or firms, except Mr. Minto Wilson, whose connection only commenced about 1910. The affidavit of Mr. Urruty only deals with generalities, and it will be observed that he makes no reference to

this particular shipment, or to any contract under which it was shipped. This affidavit forms no satisfactory foundation upon which to construct a case for the present claim ; but it does contain a significant statement that ‘ the Metallgesellschaft not only acted as bankers for the Compagnie des Minerais, and entered into contracts on their behalf, but all the routine work in connection with the execution of the contracts and the distribution of the incoming cargoes from Australia was attended to by the Metallgesellschaft in their own name.’

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“ As I have pointed out, the claim states that this cargo of zinc concentrates was said to have been ‘ intended to be sold to the Compagnie des Minerais.’ There is no direct evidence of such sale. Assuming, however, that the Compagnie des Minerais had something to do with the goods, or had some interest in them, the real question is : What was the relationship between them and the Metallgesellschaft in the transaction ? Did the Australian company buy in Australia for the one or for the other ? Did they ship them for the Metallgesellschaft, or for the Belgian company ? The Belgian company was formed mainly by the German company. Six of its directors were directors of the German company. Which company was the agent, and which the principal ? It transpired in *The Bilbster* (1) proceedings that the Compagnie des Minerais were mixed up in some way with the leady concentrates cargoes as well as the zinc ores laden on vessels coming from Australia at the same time as the *Manningtry*. (See letter from Henry R. Merton & Co., Limited, to the Compagnie des Minerais, and the reply of the latter on August 4 and 5 respectively.)

“ It will be remembered that the directions given to send the bills of lading for the zinc concentrates laden on the *Bilbster* to Beer, Sondheimer & Co. were given by the Metallgesellschaft to Mertons. It did not appear that the Belgian company had made the sale to Beer, Sondheimer & Co., or had any part or lot in the transaction. Assuming that the zinc ores shipped were bought under the contract of 1912 between the Amalgamated Zinc (De Bavay’s), Limited, and the Australian Metal Company, Limited, or that of 1914 between the Broken Hill Company, Limited, and the same company, there is no evidence that the Australian company in those

(1) See note on p. 345, post.

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contracts or in any other were ever appointed, or ever acted, as agents for the Compagnie des Minerais.

"Mention may be made of certain resolutions said to have been passed on November 7, 1911, respecting the founding of the Ore Trading Company, lest it may be thought they were overlooked. No evidence was forthcoming that the resolutions were ever acted upon, or that any agreement incorporating them was ever made. The only fact in connection with the matter which I think was proved was that a company called the Ore Trading Company, Limited, was formed about a year afterwards. The document refers in more than one place to 'the group Metallgesellschaft-Compagnie des Minerais'; and there is a curious provision that the sales on the Continent of ores belonging to the proposed new company were to be done through the Compagnie des Minerais or the Metallgesellschaft on commission, but that the commission was to be credited to the Metallgesellschaft.

"I cannot derive much assistance from these resolutions in coming to a decision in this case. The inferences I was asked to draw are from circumstances which are too much in the region of speculation.

"There is no claim here by the Australian Metal Company, Limited, to the zinc concentrates. Indeed, counsel for the claimants admitted, quite properly, that as the drafts had been accepted and paid, no property in these goods remained in the Australian Metal Company; it had passed from them, and the question was to whom it had passed.

"No claim was made for the Compagnie des Minerais till nearly a year after the seizure; and then it was only a conditional claim.

"It is important to observe that in the formal communication sent to the Foreign Office, shortly after the seizure, by Mr. Minto Wilson (who is a director both of Merton & Co., Limited, and of the Australian Metal Company, Limited, and was the only witness called for the claimants) relating to these concentrates, as well as to those in similar cases laden on a large number of British and German vessels, there is no reference whatsoever to the Compagnie des Minerais or to any interest by any neutral company in the goods.

"The same observation applies to Mr. Wilson's second letter on October 10, 1914. It is clear from these letters that Mr. Wilson's

view was that the goods had been shipped to and for the Metallgesellschaft.

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"As to the zinc concentrates he says that Merton's, Limited, and Vivian & Co. decided that it was too risky for them to include the zinc business in a pooling agreement, and 'it was therefore left to the Australian Metal Company to deal with the Metallgesellschaft of Frankfurt-on-Main regarding the ultimate disposal of this material.' He describes the position on the outbreak of war, and afterwards, as follows: 'The position on the outbreak of the war was that there were thirty-five vessels afloat, seventeen of which were of German nationality, the balance being British. The amount involved was 400,000*l.* We have had to meet and are at present meeting all the drafts on their due dates, and have, of course, received no remittances from the Continent, and are very much afraid that when the war terminates it may be impossible to remit in full, if at all; the position being that now we, *instead of Metallgesellschaft of Frankfurt-on-Main*, are the holders of these consignments of zinc concentrates against payments of the drafts.'

"Again, dealing with both zincs and leady concentrates, he said: 'I am advised that the present law governing prizes will probably not recognise our title to the goods represented by the documents which we hold against acceptance *owing to the fact that the goods were being shipped for the benefit of the alien enemy.*' And he argued that the alien enemy, by reason of German insurances, would be better off than the British financiers of the cargoes.

"In a word, the whole of his representations are founded on the fact that the goods had been shipped for, and belonged to, an alien enemy, and that enemy was the Metallgesellschaft.

"The first mention of the Compagnie des Minerais was in the claim of November 17, where it was alleged that the zinc concentrates 'were intended to be sold' to them. When I asked Mr. Minto Wilson *by whom* they were to be sold, his answer was 'By the Metallgesellschaft.'

"In the case of *The Bilbster* (1) a similar claim was made by Merton's, Limited, on behalf of the Australian Metal Company to 4254 tons of zinc concentrates 'intended for the Compagnie des Minerais.' Not a shred of evidence of any purchase by the latter

(1) See note on p. 345, post.

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was given ; on the contrary, it was proved that the goods were dealt with and sold by the Metallgesellschaft.

“ In the case of the *Cargo ex S.S. Clan Macrae* (one of the cases postponed as depending upon the present) I find that Merton & Co., Limited, originally claimed on December 14, 1914, 1156 tons of zinc concentrates, shipped by the Australian Metal Company in May, 1914, for Antwerp, on the ground that the Metallgesellschaft were the purchasers, and that they had a claim on account of the Metallgesellschaft's indebtedness to them. Many months later they alleged that the Compagnie des Minerais were the buyers, and that the indebtedness was theirs. Merton & Co., Limited, have not a single entry in their books for or against this Belgian company.

“ In the case of the steamship *Westbury* two letters of August 10 and 25, 1914, written by the Compagnie des Minerais are on paper where the company describes itself as the ‘ Agence de la Metallgesellschaft, Frankfurt s-Maine ’ ; and on referring to the file in this Court in that case I find a printed form of charterparty used by the Compagnie des Minerais, dated Antwerp, July 2, 1914, in which it is described in the margin as ‘ Agency of the Metallgesellschaft, of Frankfurt, Maine.’

“ Finally, in all matters relating to the zinc concentrates business, Merton & Co., Limited, in their financing accounts, debit all their acceptances to the Metallgesellschaft ; and, as is stated by Mr. Wilson in his letter of September 28 to the Foreign Office, ‘ Up to the outbreak of hostilities it had always been the custom of the Metallgesellschaft of Frankfurt-on-Maine to remit to us the amount of each draft before its maturity.’

“ As against the speculation that the Belgian company alone purchased the zinc concentrates shipped by the Australian company, the facts I have set out cogently impel to the conclusion that the German company were the real purchasers to whom the goods were sent.”

The following statement of facts with reference to the consignment of 1006 tons of leady concentrates is also taken from the judgment of the President :—

“ These goods are claimed to have belonged as to three-fourths to three British business houses as members of the ‘ Pool designated the 4/4 account formed by the Metallgesellschaft,’ and the release or

restitution of these three-fourths is demanded as if the pool were a partnership consisting of three British partners and one enemy partner.

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“ Counsel for the claimants described the combination as ‘ a common interest and not a partnership in the sense in which one usually thinks of a partnership carrying on a joint business.’ It was, they said, ‘ an arrangement which is not a partnership in the sense of a firm being constituted to carry on general business ; four independent persons—three of them British, and one of them German—agree that they will embark on a principle of joint adventure, and share the profits and loss.’ And they argued that under such a scheme the property was the joint property of the four. That there was a joint adventure in one sense cannot be disputed, because a certain division of the ultimate profits had to be made ; but as to whether the goods were ever the joint property of the four firms or corporations interested is open to grave doubt. In my view the position was that the Metallgesellschaft were the owners of the property, although they had to account to the three other members of the pool for the ultimate profits. At one stage, beyond question, the Australian company possessed the ownership of the goods. When the ownership passed from them, was it transferred to themselves and three other business houses, or was it transferred to the Metallgesellschaft alone with the obligation to account to the others ? These others would have certain equitable rights, but had they any rights of property or ownership to which effect can be given in a Prize Court ? The Metallgesellschaft had contracted to sell the leady concentrates to the ‘ Usine des Desargentation, Société Anonyme, of Hoboken,’ in Belgium, in a contract (dated November 10, 1911) in which they described themselves as ‘ the sellers,’ and in this contract were incorporated various clauses and stipulations which were contained in what was described as ‘ the sellers’ contract ’ (i.e., the Metallgesellschaft’s contract) with the Broken Hill South Silver Mining Company—which was made between the latter company and the Australian Metal Company, Limited, on July 22, 1911, acting, therefore, as agents for the Metallgesellschaft.

“ The Metallgesellschaft on July 16, 1914, sent letters to Mertons, Limited, and Vivian & Co. that they had allotted the leady concentrates laden on the steamship *Manningtry* to Hoboken. The

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other three members of the 'pool' do not seem to have reserved or exercised any right to deal with the goods themselves. The German company had complete dominion over the goods.

"The Metallgesellschaft purchased the goods, and disposed of them as the legal owners. If the Hoboken purchasers from them had occasion to enforce their contract, they could have recourse to the Metallgesellschaft alone."

1915. Sept. 22, 23, 24. *Sir F. E. Smith, S.-G., MacKinnon, K.C., and R. A. Wright*, for the Procurator-General. The arguments of counsel on behalf of the Crown were directed to show that, in respect of the zinc concentrates, the property was vested in the Metallgesellschaft at the time of seizure, Henry R. Merton & Co. being merely pledgees of the documents, so that, according to *The Odessa* (1), their claim would not be recognized by the Prize Court, and that, in respect of the lead concentrates, the ruling in *The Friendschaft* (2) applied, namely, "that the property of a house of trade established in the enemy's country is condemnable, as prize, whatever may be the personal domicile of the partners."

In addition to the cases mentioned in the judgment, the following were referred to, namely:—*The Antonia Johanna* (3), and the cases cited by Pitt Cobbett, at p. 25 (3rd ed.), in his *Leading Cases on International Law*—*The Jonge Klassina* (4) and *The Portland*. (5) *Continental Tyre and Rubber Co. v. Daimler Co.* (6) and *The Roumanian* (7) were also mentioned.

Maurice Hill, K.C., Leck, K.C., and D. Stephens, for the claimants.
Brightman, for the shipowner.

C. R. Dunlop, for the Union Bank of Australia, Limited, in respect of freight.

Cur. adv. vult.

Oct. 12. THE PRESIDENT (SIR SAMUEL EVANS). The claims upon which the Court has to pronounce judgment relate to two consignments of metals laden on this British vessel, namely, 1811 tons

(1) [1915] P. 52.

(2) (1819) 4 Wheat. 105.

(3) (1816) 1 Wheat. 159.

(4) (1804) 5 C. Rob. 297.

(5) (1800) 3 C. Rob. 41.

(6) [1915] 1 K. B. 893.

(7) [1915] P. 26.

of zinc concentrates, and 1006 tons of leady concentrates. [The learned President then stated the facts, already set out, with reference to the 1811 tons of zinc concentrates, and continued :]

I find upon these facts that, at the time of seizure, the cargo of zinc concentrates belonged to the Metallgesellschaft, and I pronounce their condemnation as enemy property to the Crown as lawful prize in the Crown's right to them as droits of admiralty, being seized in port after the outbreak of hostilities.

There remains to be dealt with the consignment of 1006 tons of leady concentrates. [The learned President then stated the facts, already set out, with reference to the leady concentrates, and continued :]

The view that I adopt from the facts is that the sole ownership and dominion over the goods were vested in the Metallgesellschaft, whatever rights or obligations the three claimants had in the results of the trading.

If this view is the right one, the question to be determined in these proceedings is at once solved ; because the goods would clearly be enemy property, and therefore subject to condemnation.

If my view is erroneous, it can be rectified by the tribunal of appeal.

I must, however, deal with the claim from the alternative standpoint, on the assumption that the case must be considered as if the goods belonged to a partnership.

The partnership would consist of four members, A., B., and C. being in the position of British subjects, and D. a German subject. And the question to be determined would be what the position was in the circumstances of this case with regard to the right of capture or seizure of the goods at sea after the commencement of hostilities. If a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of war, and resided there, he would, according to international law, have a commercial domicil there, and his goods would be subject to capture at sea after hostilities, although shipped before the war, or before knowledge of the war : *The Venus*. (1) Apart from a commercial domicil by residence, the property of a person may acquire a hostile character, independently of his national character or his

(1) (1814) 8 Cranch, 253.

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personal residence. If a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy : Pratt's ed. of Story, p. 60 ; and the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize : Wheaton, International Law, 4th ed. (1904), s. 334. The rule is succinctly stated by Story J. in *The Friendschaft* (1) : " It has been long since decided in the Courts of Admiralty, that the property of a house of trade established in the enemy's country, is condemnable, as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company." But it seems also to be settled that in such cases confiscation will not take place at the commencement of war, if the trade has been carried on during peace, unless the person affected continues his connection with the trade after the war : Pratt's ed. of Story, p. 61 ; Calvo, s. 1936 ; *The Vigilantia* (2) ; *The San Jose Indiano*. (3)

It is not easy to see why, in the case of a partner in a hostile house of trade, time should be given to sever connection after war before confiscation by capture at sea is permitted, when no such opportunity is given to a person having a commercial domicile by residence in hostile territory. But I accept the law as it stands. And indeed it may be that the dissenting judgment of Marshall C.J. in *The Venus* (4) is based on the more equitable ground, as many writers on the law of nations have contended. Counsel for the claimants, however, argued that there was no house of trade in Germany in this case in which the four bodies concerned were partners, or had any shares ; that " the business was a joint one carried on by joint adventurers which had its seat nowhere." I cannot accept this contention. It is inconsistent with the position of the Metallgesellschaft as exhibited in the documents, and as exemplified by their conduct of the business. When asked as to the part taken by the German company in the joint business, Mr. Wilson said : " The Metallgesellschaft really kept the accounts in Frankfurt ; they undertook the selling on the Continent ; they corresponded with the

(1) 4 Wheat. 107.

(2) (1798) 1 C. Rob. 1, 15.

(3) (1814) 2 Gall. 268.

(4) 8 Cranch, 288.

Australian Metal Company with regard to the shipments, and they generally managed the account."

The Australian Metal Company seem to have had nothing to do with the goods after shipping them ; Mertons & Co., Limited, only did the financing, and received—in advance as stated—funds to meet the drafts from the German company ; and Vivian Younger & Bond do not appear to have had anything to do with reference to the buying, or shipping, or disposal of the goods. They guaranteed a share of Merton & Co.'s obligations to the bank, and that was all.

In discussing the commercial domicile of a merchant, Calvo (4th ed., vol. 4, s. 1933, p. 67) says—I will give a rough translation of it : "It may be said, if we are dealing with a merchant, that he has his commercial domicile at the principal seat of his business, at the point at which his operations are concentrated." ("On peut donc dire, s'il s'agit d'un négociant, qu'il a son domicile commercial au siège principal de ses affaires, sur le point où se concentrent ses opérations.")

The whole centre of activity and operations of this business was at Frankfurt, at the offices of the Metallgesellschaft. They ordered, they bought, they chartered vessels, they gave all instructions, they received the consignments, they paid for the goods, they sold or disposed of them, they received the purchase prices, they attended to all the correspondence, and kept all the accounts at their head house at Frankfurt.

How could it be held that the house of trade of this business was not at Frankfurt ? If there was no house of trade of the business in Germany, or elsewhere, as contended, then (whatever might be the difficulties in the way of British subjects continuing in the business) neutrals of all countries might engage in the business with impunity, and without fear of confiscation of their shares, and to the great advantage of the German company, and of the German State, as well as of themselves.

I feel no doubt in deciding that this business had its house of trade in Frankfurt.

The question upon which the right to seize and confiscate the shares of the quasi-partners then turns upon whether they continued their connection with the house of trade after the commencement of the war.

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I have not found any direct decisions which help. It is obviously a question of fact in any particular case whether there has been a continuation of the connection with a hostile house of trade during war; or whether sufficient steps have been taken, and in proper time, to sever the connection. Some guidance is afforded by the principles and tests applied in cases relating to subjects of a cognate kind, e.g., continuing to trade with the enemy after war, or continuing a commercial domicile by residence after hostilities have begun. An instance of the former occurs in *The Hoop* (1), where Lord Stowell said that the rigid rule against such trading had been enforced "where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities." An illustration of the latter kind will be found in Marshall C.J.'s celebrated dissenting judgment in *The Venus* (2), where he discusses how a resident commercial domicile might be terminated—e.g.: "If a British subject residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country"; and in another passage (3): "An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile."

In discussing the question of confiscation of goods belonging to non-enemy parties in a house of trade (*maison de commerce*) in enemy territory, Calvo (vol. 4, s. 1937, p. 70) wrote as follows—I give the rough translation: "According to these principles, if a merchant domiciled in a neutral country does not take at the commencement of the war immediate measures for withdrawing his goods from a commerce which has no longer a neutral character and to which he could legitimately attend in time of peace in the country of a belligerent, he cannot guarantee his goods from capture and from hostile confiscation by alleging that personally he resides in a neutral country." ("D'après ces principes, si un négociant domicilié dans un pays neutre ne prend pas au commencement de la guerre des mesures immédiates pour retirer ses biens d'un commerce qui n'a

(1) (1799) 1 C. Rob. 196, 216.

(2) 8 Cranch, 253, 314.

(3) 8 Cranch, 315.

plus le caractère neutre et auquel il pouvait légitimement se livrer en temps de paix dans le pays d'un belligérant, il ne pourra garantir ses biens de capture et de confiscation hostiles, en alléguant que personnellement il réside dans un pays neutre.")

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If it be obligatory upon a neutral to take such immediate steps ("sans retard" is another phrase used by Calvo) it is none the less obligatory upon the subject of a belligerent.

I think also that it is incumbent on the person who has to sever his connection in this way to show clearly by satisfactory proof that he took steps to do so; just as it rests upon a resident in hostile territory to prove that he was not there *animo manendi*: cf. *The Bernon*. (1)

It is a case like those where the burden of proof has been laid upon claimants on the ground that they have in their own power the knowledge of all the relative facts, and so can prove their case fully, if it be honest and well founded. It is their duty to take the necessary measures to end the connection with the hostile house; and it is for them to establish affirmatively the measures alleged to have been taken.

No evidence was given by or for either of the claimants that they did anything to put an end to their connection, whatever it was, with the Frankfurt house of the Metallgesellschaft. Mertons & Co., Limited, as was shown in the case of *The Bilbster* (2), tried to protect the property, which had been bought and sold by the German company, from capture; with that object they paid the 5000*l.* freight, and debited it in their books against the Metallgesellschaft as a payment made on their account.

The transactions with reference both to zinc and leady concentrates were somehow carried on by these claimants so that an anticipated debit in the German company's account of about 400,000*l.* at the end of September had been reduced to about 27,000*l.* by April, 1915. They continued to meet all the drafts for the goods. They paid 1046*l.* freight on the leady concentrates to the owner of the *Manningtry*, on October 9 and debited it to the "Metallgesellschaft Australian Concentrates Charges Account."

Did they do anything to countermand or divert the voyages of the vessels afloat at the outbreak of the war carrying the concentrates,

(1) 1 C. Rob. 101.

(2) See note on p. 345, post.

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so as to prevent a possible delivery to the Metallgesellschaft ? More especially, did they do anything with reference to those vessels belonging to Germany, bound for German ports like Hamburg, Bremen, and Stettin, so as to prevent the delivery of the ore cargoes to the Metallgesellschaft in case the vessels might escape the vigilance of British or Allied cruisers ? There was no proof of any such action on their part.

Did the Australian Metal Company in Australia put an immediate end to the buying or shipping, or to their connection, either through Australia or in London ? They had an office in London where material facts would be known.

As to Vivian Younger & Bond, none of the firm or their employees were seen or heard in these proceedings as to their claim or conduct.

Upon the whole case, if the claimants are to be regarded as partners, or persons having shares in the German house of trade, I find that none of them took immediate or any steps to put an end to their connection with that house by reason of the outbreak of war ; and their shares in the goods must upon this footing also suffer condemnation.

I accordingly pronounce judgment of condemnation of all the goods claimed as good and lawful prize seized on behalf of the Crown as droits of admiralty.

As to the 1046*l.* paid by Mertons & Co., Limited, for freight on October 9, the facts were similar to those relating to the payment of the freight in *The Billster* (1), with this circumstance in addition, that the payment was made after Mertons, Limited, knew of the capture. It is not necessary to repeat what I said upon this head in that case. This claim must be disallowed.

The claim of the Union Bank of Australia, Limited, takes the form of asking for an order that the sum of 3100*l.*, which this banking company paid to the shipowners on account of freight on three consignments of zinc concentrates (total 3054 tons) which have been condemned, should be repaid to them out of the proceeds. The whole freight amounted to 3207*l.* 6*s.* The 3100*l.* was paid in two sums on September 28 and 29, 1914. The bank thought that they were entitled to have the goods delivered to them as holders of the bills of lading, and the cargoes were discharged into lighters

(1) See note on p. 345, post.

employed by them. The goods had, in fact, been seized on behalf of the Crown on September 23. The bank had no knowledge of this when they paid the 3100*l*. They did not learn of the seizure till after the writ was issued on October 1. They refused to pay the balance.

When the officers of the Crown seized the goods, if no freight had been paid, the goods would only be taken cum onere of whatever ought to be allowed for the carriage in lieu of freight. The bank innocently and honestly made the payment under a mistake, and so relieved the goods of that onus. If they had known of the seizure they would not have paid the money. The facts differentiate the case from *The Clan Urquhart* (1), where the claim of Huth & Co. was disallowed. No question was raised as to the amount.

In the circumstances I hold that it is just and equitable that the money should be repaid to the bank ; and I make an order that the Marshal do accordingly pay to the bank the sum of 3100*l*. out of the proceeds of the sale of the condemned cargoes.

Leave to admit an appeal. The amount of freight still due to shipowner to be determined by the Registrar on the principles laid down in The Juno [1916] P. 169.

Solicitor for the Procurator-General on behalf of the Crown : *The Treasury Solicitor.*

Solicitors for claimants : *Waltons & Co.*

Solicitors for shipowner : *Downing, Handcock, Middleton & Lewis.*

Solicitors for Union Bank of Australia : *Bircham & Co.*

NOTE.—In the case of *THE BILBSTER* (cargo ex, No. 84)—a British steamship laden with zinc concentrates shipped by the Australian Metal Company, Limited, at Port Pirie, South Australia, for Antwerp—the learned PRESIDENT, in delivering judgment on October 6, 1915, said :

(1) In the case of *The Clan Urquhart* the learned President declined to make an order for repayment by the Marshal of the freight out of proceeds on the ground that the payment was made at the risk of the claimants, who were trying to get possession of the goods knowing that they were destined for Germany. See *Lloyd's List*, May 11, 1915.

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The third question "relates to a claim by Henry R. Merton & Co., Limited, for an order for (the return of) a sum of 5000*l.* paid by them to the shipowners on account of freight. . . . It was put forward at the hearing in two ways. It was contended that they were entitled either to have the 5000*l.* refunded to them by the shipowners, or to have it paid to them by the Crown out of the proceeds of the condemned cargoes.

Their claim in the former case was based on what was alleged to be a total failure of consideration. In the latter, it was contended that the payment was made in circumstances which make it equitable that the money should be repaid by the Crown out of the proceeds of the prize.

The facts relating to the payment of the 5000*l.* may be stated together in reference to both grounds of claim.

The claimants were intimately connected with the Australian Metal Company, Limited, with the Metallgesellschaft of Frankfurt, and with the Compagnie des Minerais de Liège. The circumstances also establish a close relationship between them in the transactions leading up to the payment with Beer, Sondheimer & Co., who were admitted to be enemy owners of the goods.

In their general dealings with the Australian Metal Company, and with the Metallgesellschaft, their case was that they acted as financiers, by accepting drafts and arranging for their payment against delivery of the documents or the goods. But as to these particular cargoes, no drafts were drawn upon, or accepted by them, and no advances of money or any financial assistance were made or given by them.

On June 22, 1914, the Metallgesellschaft directed them to forward two bills of lading for consignments 2 and 3, when they reached this country, to one Straus, of Antwerp, the representative of Beer, Sondheimer & Co., with orders to deal with them according to the instructions of Beer, Sondheimer & Co. at Frankfurt. Having received the bills of lading from the Union Bank of Australia, they, in accordance with the afore-mentioned direction, sent them to Straus on July 4, 1914, to be disposed of according to the instructions of Beer, Sondheimer & Co., Frankfurt. After the vessel arrived at Antwerp part delivery of the goods was made to Beer, Sondheimer & Co., and arrangements were made by them with the shipowners to pay 2500*l.* on account of the freight.

These arrangements were not completed by payment because of the outbreak of the war; and before any part of the freight was received the vessel had been ordered to proceed out of Antwerp towards Cardiff.

Various communications took place in the next few days between Mertons and Straus and the Compagnie des Minerais, with the object of having the bills of lading returned to Mertons.

The shipowners' agents were pressing for their freight, and a meeting was held in London on August 8 of representatives of the shipowners and charterers, at which Mertons said they were prepared to assume responsibility for the two bills of lading, and offered to pay the whole

of the freight on them if the vessel was sent to Swansea and the balance of the goods were delivered to them.

These negotiations were continued until August 11, when payment of the 5000*l.* was made by Mertons to the shipowners, and an undertaking was given by them to indemnify the shipowners from any consequences resulting from the discharge of the cargo without the production of the full shipping documents. They had not up to then succeeded in getting the bills of lading into their possession.

Meantime, Mertons had been settling with the enemy purchasers, Beer, Sondheimer & Co., through the latter's London branch, what they should do in order to get possession of the cargoes. . . .

As against the shipowners, it was contended that the consideration for the agreement upon which the 5000*l.* was paid to the shipowners on account of the whole freight was that the shipowners should actually deliver to Mertons the whole of the cargo out of the ship so as to place them in the position of owners. All the shipowners were interested in was the freight, and they continued to assert a lien on the goods until the whole freight was paid or agreed to be paid. On payment of the 5000*l.* they gave up their claim to the lien, and proceeded to discharge the cargo out of the ship. That was all, in my view, that they had contracted to do. They did not guarantee that in any event delivery should be given to Mertons. The fact that the Crown afterwards seized the cargo does not affect the shipowners, and gives no right whatever to Mertons to have the 5000*l.* repaid by the shipowners.

Failing in this, Mertons asked that the amount should be paid by the Crown to them out of the proceeds of the prize. Where freight has been innocently and honestly paid by persons in respect of cargoes afterwards seized which would have had to bear the burden of the freight if unpaid, it may be equitable that the payment should be recouped by the captors; but, broadly speaking, in such a case the payment would have to be made in the usual course of business; and in circumstances where there was a request, expressed or implied, by the captors that the payment should be made, or where the captors had done some act showing their acquiescence in, or adoption of, the payment.

A voluntary payment by persons for motives or purposes of their own would not be sufficient ground for a claim for recoupment; still less would it be if there were involved in the motives a desire to defeat the rights of a belligerent or to escape a rightful seizure by the Crown.

I have set out the circumstances in which Mertons made the payment. They had no title whatever to the goods. There is no evidence that the Compagnie des Minerais had any right to the goods, nor that the payment was made by Mertons at their request, or on their behalf, or even with their knowledge; 2225*l.* 5*s.* of it had become due from Beer, Sondheimer & Co., whose cheque had been promised to the shipowners before the vessel left Antwerp. It may be that in the final "adjustment" intended between Mertons and Beer, Sondheimer & Co. in dealing with "all parties concerned" this sum would have been treated as a payment on behalf of that enemy company.

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The whole of the 5000*l.* was debited by Merton & Co., Limited, in their books of account to the Metallgesellschaft, of Frankfurt, which is evidence of their having paid it on behalf of this enemy firm.

For whomsoever it was paid, Merton & Co., Limited, made the payment in order to try to preserve the goods for the owners, whom they knew to be enemies, and to gain some possible advantage to themselves, or their principals or co-adventurers, the Metallgesellschaft. And in acting thus they appear not to have hesitated to engage in commercial intercourse with enemies of the country.

This claim is one which has no sort of foundation. To launch such a claim much assurance was needed, and to persevere in it showed, further, a reckless want of appreciation of the possible consequences.

The judgment of the Court is that the cargoes seized be condemned as prize; as droits of admiralty, and be sold by the Marshal, that out of the proceeds the sum of 2546*l.* 10*s.* be paid to the shipowners (that being the balance of the sum awarded to them in respect of the carriage of the goods, after crediting the sum of 5000*l.* already received by them), and that the claim of Henry R. Merton & Co., Limited, both against the shipowners and against the Crown be disallowed.

T. L. M.

THE END.

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 The Rules of the Supreme Court (Poor Per-
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6. — *Evidence—Husband's Petition—Leave to proceed without citing any Co-respondent—Affidavit by Person since deceased—Leave to read Affidavit at the Hearing.*

Upon an undefended divorce petition by the husband, making general charges against the wife of acting as a common prostitute and also containing specific charges of acts of adultery with men unknown, upon proof at the hearing of the death of one of the deponents whose affidavit was before the Court on the motion dispensing with co-respondents,

The Court (Shearman J.) allowed the affidavit of the deceased deponent to be read. *WILLIAMS v. WILLIAMS* - Shearman J. 130

7. — *Maintenance—Wife's Petition for Maintenance—Husband's Income—Insufficient Statement by him—Further and better Affidavit—Security—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.*

In July, 1915, on the petition of Mrs. H. a decree nisi was pronounced for the dissolution of the marriage between her and E. H. She filed a petition for maintenance in which she alleged that he had a very large income derived from shares in a private newspaper company, directors' fees, freehold and leasehold property, a racing establishment and breeding stud, greyhounds, and other property. By his answer E. H. declined to give minute details, but admitted an income of approximately 29,000*l.* per annum, of which 12,000*l.* per annum was derived from directors' fees, 11,475*l.* from shares in the newspaper company, and 2400*l.* from shares in another company. He offered to agree to an order for 1500*l.* a year. On an application by the petitioner for an order that he should make a further and better answer the registrar held that he had sufficient material to deal with the case in accordance with the principles laid down in *Sykes v. Sykes* [1897] P. 306 and *Kettlewell v. Kettlewell* [1898] P. 138, and refused to order a further answer; and Bargrave Deane J. dismissed an appeal from this order:—

Held (reversing the decision of Bargrave Deane J.), that there was no hard and fast rule fixing any particular proportion of the husband's income as the correct amount to be allowed for maintenance; but the Court had to consider (inter alia) the security to be given for the allowance, and in this case there were no materials on which this could be done; a further affidavit must therefore be filed. *HULTON v. HULTON* - - - - - C. A. 57

DIVORCE—continued.

8. — *Restitution of Conjugal Rights—No Matrimonial Offence by Petitioner—Discretion of Court to refuse Relief—Test of Discretion, Impossibility of Cohabitation.*

The Court has discretion to refuse relief to a petitioner seeking a decree of restitution of conjugal rights, even in the absence of a matrimonial offence on the part of the petitioner.

The question for decision is whether the respondent had reasonable cause for leaving the petitioner, and the test is whether it has become practically impossible for the spouses to live together. A wife may develop habits of intemperance and may exhibit jealousy of her husband and frivolity of conduct, and these facts may constitute no reasonable grounds for the husband deserting his wife.

Beer v. Beer (1906) 54 W. R. 564 distinguished. *GREENE v. GREENE* Shearman J. 188

9. — *Separation Deed—Adultery—Cruelty.*

A husband was guilty of cruelty to his wife, and this led to a separation by deed. The deed contained a covenant not to sue for any offence before the date of its execution, but with a proviso that this and all the other covenants should become void in the event of a judicial separation being pronounced. The husband committed adultery after the date of the deed, and the wife petitioned to have the marriage dissolved:—

Held, that it would not be just or reasonable to put the petitioner to the expense, delay, and inconvenience of a second suit, based upon the same evidence of cruelty and adultery; and that upon her present petition, founded upon adultery since the date of the deed, coupled with the previous cruelty, both of which offences were proved to the satisfaction of the Court, she was entitled at once to a decree nisi.

Bourne v. Bourne [1913] P. 164 approved and followed.

Lipman v. Lipman [1916] P. 25 dissented from. *THOMPSON v. THOMPSON* Shearman J. 165

10. — *Separation Deed—Covenant not to institute Proceedings—Petition for Dissolution of Marriage—Cruelty alleged before Date of Deed—Decree of Judicial Separation on Ground of subsequent Adultery.*

A husband and wife separated under a deed after (as subsequently proved) cruelty on his part. The deed contained (inter alia) a clause that no proceedings should be instituted relating to the relationship of husband and wife, and it also contained a proviso that if the marriage should be dissolved, or if the parties should be judicially separated by reason of any misconduct occurring after the date of the deed, all the covenants and provisions thereof should be void.

The husband subsequently committed adultery, and the wife petitioned for dissolution of the marriage:—

Held, that, although the deed was not set up by the husband (the suit being undefended), the Court should take cognizance of its contents, and that the petitioner was therefore not entitled

DIVORCE—continued.

to a decree of dissolution of marriage upon her present petition; but, inasmuch as the decree of judicial separation, which the Court now pronounced on the ground of adultery, put an end to the deed, by reason of the proviso therein contained, the petitioner would, on a subsequent petition, be entitled to have her marriage dissolved on the ground of that adultery coupled with the antecedent cruelty.

Dowling v. Dowling [1898] P. 228 and
Bourne v. Bourne [1913] P. 164 not followed
LIPMAN v. LIPMAN - - - *Horridge J.* 25

11. — *Separation Deed — Desertion — Breaches by Husband—No Repudiation of Deed by Wife—Plea of Desertion not established.*

A separation by deed implies consent of the parties and negatives desertion. If one party fails to pay the allowance provided by the deed, and the other, relying upon the deed, takes steps to enforce payment thereunder, the latter cannot successfully plead desertion. *ROE v. ROE* - - - - *Shearman J.* 163

12. — *Service — Petition — Respondent on Active Service Abroad—Substituted Service of Citation and Petition—Order—Practice.*

The practice laid down by the President (Sir Samuel Evans) in regard to service of decrees for restitution of conjugal rights upon respondents engaged on active service abroad does not apply to the service of citations and petitions in suits for dissolution of marriage; although it is recognized that where, after service of the citation, it appears that a respondent desires to contest the suit, the further proceedings may have to abide his return to this country, on leave or otherwise.

Where personal service of a citation and petition for divorce could not be effected upon a respondent, who was serving as a seaman on board one of His Majesty's ships in the Far East in time of war, the Court directed that service might be effected by sending the documents in a prepaid registered letter addressed to the respondent, and fixed the time for appearance at one hundred days.

Mason v. Mason [1915] W. N. 200 and
Lang v. Lang [1915] W. N. 236 distinguished.
TURNER v. TURNER - - - *Shearman J.* 324

DOMICIL.

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 — British company under enemy
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PRINCIPAL PLACE OF BUSINESS OF COMPANY—British company controlled
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 holders - - - 241
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See PRIZE COURT.

PRIZE COURT—British Ship—Enemy Cargo
 shipped before War—Interruption of Voyage—
 Seizure in Port after Declaration of War—
 Incapacity of Ship and Cargo to proceed—Claim
 by Shipowners for Freight and Expenses—Con-
 siderations affecting Amount to be allowed.

A British vessel, shortly before the outbreak
 of war between Great Britain and Germany, left
 Bristol for Amsterdam, with three parcels of
 cargo ultimately destined for Germany, and put
 into Swansea to load other cargo. Whilst there,
 and after the outbreak of war, the three parcels
 were seized by the Customs authorities, and sub-
 sequently condemned as lawful prize. The ship-
 owners thereupon raised a claim for freight, and
 also for expenses incurred by reason of the
 detention of the vessel owing to the seizure of the
 goods :—

Held by the President (Sir Samuel Evans),
 that the claim to some freight, and to the items
 for extra costs of discharging and shifting the
 goods at Swansea, should be allowed against the
 cargoes, and, in ascertaining the total amount,
 the following general rule would assist the regis-
 trar and merchants in this and similar cases.

Such a sum to be allowed for freight as is fair

PRIZE COURT—*continued*

and reasonable in all the circumstances, regard
 being had to the rate of freight originally agreed
 (though this is not necessarily conclusive), to the
 extent to which the voyage has been made, to
 the labour and cost expended, or any special
 charges incurred in respect of the cargo seized
 before its seizure and unlivery, and to the benefit
 accruing to the cargo from the carriage on the
 voyage up to the seizure and unlivery; but no
 sum to be allowed (unless there be some special
 and exceptional circumstances) in respect of any
 inconvenience or delay attributable to the war
 or to the consequent diversion, detention, and
 seizure, as such matters are the unfortunate
 results of a state of war to which those engaged
 in shipping must submit. **THE JUNO**
Evans, Pres. 169

2. — *British Ship*—Ship registered as—
 Seizure as Prize—Ownership—British Company
 under Enemy Control—Merchant Shipping Act,
 1894 (57 & 58 Vict. c. 60), s. 1.

A steamship registered as a British ship,
 which had been chartered to the Admiralty after
 the outbreak of war between Great Britain and
 Germany, was seized as prize on the ground that
 she was enemy property or the property of a
 company controlled by the enemy. She was
 used as a tender for the vessels of the Hamburg-
 Amerika Linie coming to Southampton and was
 nominally owned by a British company. The
 Hamburg-Amerika Linie appointed the directors,
 who paid nothing for their qualification shares;
 took from them an agreement to conform to its
 instructions; received the profits; and, in the
 person of its nominees, owned the entire share
 capital issued by the company :—

Held, that it was the duty of the Prize Court
 to look beyond the nominal ownership and to
 ascertain who were the real owners of the vessel;
 that the real owners were the Hamburg-Amerika
 Linie; and that the vessel, therefore, was
 enemy property and must be treated like any
 other enemy merchant ship actually in port at
 the outbreak of hostilities.

Order for detention as in *The Chile* [1914]
P. 212. THE ST. TUDNO - Evans, Pres. 291

3. — *Cargo*—Enemy Pledgor of—Default in
 respect of Advances—Contract of Sale by Pledgee—
 Loss of Right to redeem—Release to Purchaser.

A British steamship, before the outbreak of
 war between Great Britain and Germany, left
 Hankow with sundry packages of tallow, shipped
 by a German, and consigned to a British, firm.
 On arrival at Liverpool, after the outbreak of
 war, the consignees declined to take delivery of
 the goods from enemy subjects. Thereupon a
 Japanese bank, which, at the time of shipment,
 had made advances in respect of which the ship-
 pers were in default, exercised, as indorsees and
 holders of the bill of lading, their power of sale,
 by entering into a contract to sell the goods to a
 British firm. On the seizure of the tallow by the
 Customs authorities as prize :—

Held by the President (Sir Samuel Evans),
 that the goods must be released to the purchasers,
 for, when the contract of sale was made, the
 enemy pledgors lost their right to redeem, and

PRIZE COURT—continued.

thereby ceased to be owners. The goods were, therefore, not subject to seizure as enemy property. **THE NINGCHOW** - Evans, Pres. 221

4. — Cargo—Insurance against War Risks—Neutral Property at Date of Seizure—Property in Enemy Underwriters at Date of Claim—Condemnation.

Certain goods seized as prize were insured against war risks by enemy underwriters in Hamburg. At the time of seizure the property in the goods was in the shippers, who were neutrals. After the seizure the shippers' German agents claimed against the underwriters for a total loss. The underwriters paid in full and thereupon became owners of the goods, and the claim filed by the shippers in the Prize Court proceedings in fact was made on behalf of the underwriters :—

Held, that the claim must be disallowed, and that the proceeds of the goods (which had been sold) must be condemned as enemy property. **THE PALM BRANCH** - Evans, Pres. 230

5. — Enemy Cargo—Ante-bellum Shipment—Produce of Enemy Soil—Seizure—Neutral Claimants—Branch Office in Turkey—Domicil—Turkish Capitulations System.

Before the outbreak of war between Great Britain and Turkey a consignment of sultanias was shipped at Smyrna on a British vessel by the claimants, a Greek company having its head office at Athens and a branch at Smyrna, where it owned a vineyard. After the outbreak of war, the sultanias, which were the produce of the vineyard, were seized as prize on the arrival of the vessel at Liverpool.

The claimants contended that they had a neutral domicil at Athens, that the business at Smyrna was a mere branch, and that in regard thereto they were entitled to the benefit of the privileges of the Turkish Capitulations system, whereby their character as owners of the vineyard was that of neutral subjects :—

Held, that the effect of the Capitulations was irrelevant, and that, on the broad principle that the produce of land in an enemy country is subject to confiscation although shipped before war, the goods must be condemned. **THE ASTURIAN** Evans, Pres. 150

6. — Enemy Cargo—British Ship—Partnership—Joint Adventure—Division of Profits—Non-severance of Business Relations by British Shareholders—Freight.

Before the outbreak of war, a British steamship left an Australian port for Antwerp with cargo deliverable to order, and, after the outbreak of war, put into Torbay for coal. As the ship's papers showed that the charterers were a German company, the Customs officers at Brixham seized the cargo on suspicion that it was enemy owned, and a writ was duly issued.

Of this cargo a portion was claimed by a British company on the ground that they had taken up the shipping documents, accepted the shippers' drafts for the value of the goods, and paid the freight. A Belgian company also claimed as owners if it should be held that the

PRIZE COURT—continued.

property had passed from the British company ; but the President condemned this portion of the cargo as being, on the evidence, at the time of seizure, enemy property belonging to the German charterers, the British company being merely pledgees of the documents and, therefore, in accordance with the decision in *The Odessa* [1915] P. 52, not recognized in a Prize Court.

Another consignment was claimed as to one fourth share each by the British company, the Australian Metal Company (a registered British company, which shipped all the goods ; but the majority of whose shareholders were German), and a British partnership, as being members of a "pool" along with the German charterers :—

Held by the President (Sir Samuel Evans), on condemning also this consignment as enemy property, that the German company were, at the time of seizure, the owners, notwithstanding that they had to account for the ultimate profits to the three other members of the pool, and, if the pool were deemed a partnership of three British partners and one enemy partner, so that the consignment was the joint property of the four partners, it was incumbent on the three British partners to show (which they had not done) that they had taken prompt steps to sever their business relationship with the enemy partner on the outbreak of war, just as it rests upon a resident in hostile territory to prove that he was not there animo manendi : *The Bernon* (1798) 1 C. Rob. 101.

A British banking company innocently and honestly paid freight under the impression that they were entitled to have the goods delivered to them as holders of the bills of lading, and in ignorance of the fact that the goods had already been seized as prize on behalf of the Crown :—

Held by the President, that the payment must be treated as made under a mistake, and the money repaid to the bank out of the proceeds of sale of the condemned cargoes. **THE MAN-NINGTRY** - Evans, Pres. 329

7. — Enemy Ship—German Merchant Ship in British Port—Entry into Port for other than Commercial Purposes—Detention—Subsequent Permission to leave Port—Outbreak of War between Great Britain and Germany—Hague Peace Conference, 1907, Convention VI., Preamble and arts. 1 and 2.

By art. 1 of Convention VI. of the Hague Peace Conference, 1907, relative to the status of an enemy merchant ship at the outbreak of hostilities, it is stated to be desirable that such a ship should be allowed to depart freely either immediately or after a reasonable number of days of grace ; and art. 2 provides that if, owing to circumstances beyond her control, the ship has not been able to leave the port within that period, or has not been allowed to leave, she may not be confiscated but merely detained.

The preamble to the Convention states that the contracting parties, "anxious to ensure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak

PRIZE COURT—continued.

of hostilities, have resolved to conclude a Convention to this effect."

On August 3, 1914, a German liner bound from Philadelphia to Hamburg with passengers and cargo, having heard of the outbreak of war between France and Germany, put into Falmouth as a neutral port of refuge to avoid possible capture by French cruisers. On the early morning of August 4 the master was told by the Customs authorities that his vessel was detained and would not be allowed to leave the port. About 4 P.M. on that day he was told that the vessel was unconditionally released, but no steps were taken on board her to indicate that she intended to leave. From 11 P.M. a state of war existed between Great Britain and Germany, and on the following morning the vessel was seized as prize:—

Held by the President (Sir Samuel Evans), that, assuming Convention VI. to be binding on this country, the vessel was not entitled to the protection afforded by arts. 1 and 2, and that she must be condemned, as she did not intend to avail herself of the permission to leave the port, and she was not in the port for commercial purposes.

A merchant vessel of a belligerent Power in an enemy port at the commencement of hostilities is not protected from condemnation under arts. 1 and 2 of Convention VI. if she has entered the port to avoid possible capture by the armed vessels of another belligerent, or to procure orders from another belligerent or its subjects. *THE PRINZ ADALBERT* - -

Evans, Pres. 81

8. — Enemy (German) Ship — Enemy (Austrian) Cargo—Cargo seized before Declaration of War—Continuous Seizure—Jurisdiction—Hague Convention No. VI., arts. 3 and 4.

After war had broken out between Great Britain and Germany, a German merchant vessel was seized by one of His Majesty's ships of war and taken, with her cargo, owned by Austria subjects, into Plymouth. A writ was issued against the cargo some hours before the outbreak of hostilities between Great Britain and Austria, and a second writ was subsequently issued against the cargo which remained in the custody of the Customs authorities until, by consent, sold by the Marshal and the proceeds paid into Court:—

Held by the President (Sir Samuel Evans), that the goods, or their proceeds in Court, must be condemned as good and lawful prize, for the goods were, and were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain and Austria-Hungary, and, therefore, although unlivered from the vessel in port, these goods were, according to the decision in *The Roumanian* [1915] P. 26, subject to seizure, and must be regarded as enemy property not protected by the Hague Convention No. VI., as Germany had declined to accede to art. 3 in respect to the protection to be afforded to a merchant ship, and that article is supplemented by art. 4 in respect of the cargo. *THE SCHLESSEN*

Evans, Pres. 225

PRIZE COURT—continued.

9. — Enemy Ship—Outbreak of War—Days of Grace—Hague Convention VI. (1907)—Non-application—"Navire de commerce"—Repairs—Dry-docking—Concession by Crown.

A yacht is not a "navire de commerce," and, therefore, is not entitled to the protection in respect of days of grace, &c., conferred on a merchant ship by the Sixth Hague Convention (1907), art. 1.

In the case of an enemy-owned yacht seized, on the outbreak of war, in a British port, and subsequently condemned and ordered to be sold, claimants sought to recover from the Crown the cost of necessary repairs executed before the seizure, together with the expenses attending subsequent dry-docking, and, as an act of grace, the Crown consented to the assessment of these amounts by the registrar and merchants.

Observations on the effect of non-compliance by one belligerent with the terms of the Hague Convention to which he is a party. *THE GERMANIA* - - - Evans, Pres. 5

10. — Freight—Shipowner's Expenses incurred by compulsory Deviation.

As indicated in the judgment in *The Juno* [1916] P. 169, British shipowners, in war time, are not permitted to claim for any delay or inconvenience incurred by reason of the diversion or detention of their vessel for the purpose of seizure and making unlivery of confiscable enemy property. The loss (if any) to the shipowner results from the war and must be submitted to, just as he is not entitled to bring into the estimation of the freight any alleged excess in the cost of discharging at the port at which the vessel actually delivered the cargo, and the cost at the port to which she was originally destined. *THE TREDEGAR HALL* - - Evans, Pres. 217

11. — Jurisdiction — Cargo — Seizure of —Release of Proceeds—Claim for Freight.

When once the Prize Court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents, with the result that its jurisdiction will be exclusive as to the allowance of freight, damages, expenses, and costs in all cases of seizure and capture, although there may have been a voluntary release of the cargo, or its proceeds, before the incidental question arose. *THE CORSICAN PRINCE* - - - Evans, Pres. 195

12. — Jurisdiction — Turkish Cargo on British Ship — Discharge in British Port —Storage in Bonded Warehouse in Port—Subsequent Outbreak of War with Turkey—Seizure as Prize and Droits of Admiralty.

Before the outbreak of war between Great Britain and Turkey twelve bales of tobacco, the property of a Turkish merchant in Smyrna, were landed in the Port of London ex a British ship and were stored in a bonded warehouse in the port. After the outbreak of war with Turkey the goods were seized as prize and droits of admiralty:—

Held by the President (Sir Samuel Evans), that, on the principles laid down in *The Roumanian* [1915] P. 26; [1916] 1 A. C. 124, the goods

PRIZE COURT—continued.

were the subject of seizure as maritime prize and must be condemned. *THE EDEN HALL*
Evans, Pres. 78

13. — *Neutral—Cargo—Contraband—Requisition before Condemnation—Prize Court Rules, Order XXIX.—Jus angariae.*

A neutral vessel carrying 400 tons of copper from New York to Stockholm was stopped on the high seas by a British cruiser, a prize crew put on board, and the vessel ordered to Barrow to discharge. A writ having been issued in prize, the Procurator-General, acting for the War Department, applied on behalf of the Crown to requisition the contraband part of the cargo. On objection taken by the neutral owners of the copper that the proceedings were not in conformity with the law of nations:—

Held, that the proposed interlocutory order could be made under the inherent powers of the Prize Court, without infringing any rule of the law of nations, as well as under the powers conferred by the Order in Council under which Order XXIX. of the Prize Court Rules had been made.

Held, further, that the claimants were not entitled to have the property retained in specie until condemned, but would have the proceeds of sale, together with damages and costs (if any), should it turn out that the part cargo in question was not confiscable.

The nature of the right of angary, obsolete so far as it rested on the Royal prerogative, discussed. *THE ZAMORA*
Evans, Pres. 27

14. — *Neutral—Goods of Enemy Firm—Seizure of—Goods shipped before Outbreak of War—Neutral Partner's Share—Conditions of Protection from Confiscation.*

Where goods belonging to an enemy firm are seized as prize, the goods having been shipped to the firm before the outbreak of war, a neutral partner of the firm will not lose his right to have his share of the goods protected from confiscation merely because he allows the delivery of the goods to the firm to proceed in the ordinary course, provided he does no act after the commencement of hostilities to further or facilitate that delivery. *THE ANGLO-MEXICAN (PART CARGO EX)*
Evans, Pres. 112

15. — *Neutral—Order in Council, "Retaliatory," of March 11, 1915—Validity—Inconvenience to Neutrals—Compensation for Delay and Expenses—Freight.*

The Order in Council of March 11, 1915, "for restricting further the commerce of Germany" (generally known as the "Retaliatory" Order) is not invalid by reason of the fact that, in providing that merchant ships may be required to discharge in a British or allied port goods on board destined for the enemy or of enemy origin, inconvenience is necessarily caused to neutral shipowners.

The Order does not entail upon neutrals a degree of inconvenience which is unreasonable considering all the circumstances of the case, and neutral shipowners are not entitled to compensation unless, possibly, unreasonable delay

PRIZE COURT—continued.

or expense has been incurred in carrying out the provisions of the Order.

Freight, in accordance with the principles laid down in *The Juno* (1914) 1 Br. & Col. P. C. 151, allowed to the shipowners out of the proceeds of the sale of the discharged goods. *THE STIGSTAD*
Evans, Pres. 123

16. — *Neutral Ship—Cargo declared Contraband after starting on Voyage—Freight—Demurrage.*

On September 16, 1914, a neutral (Dutch) vessel left a neutral (Spanish) port for a neutral destination (Rotterdam) with a cargo of iron ore shipped by a Spanish firm and consigned to a Dutch firm. On September 19, when off the Isle of Wight, the vessel was stopped by a British warship and sent into a British port for examination. On September 21 iron ore, which had been declared free, was made conditional contraband, and, on October 4, the cargo was seized as prize, on the assumption that it was intended for ultimate delivery to Krupp's in Germany. To discharge the cargo the vessel was sent to Middlesbrough, where she was released:—

Held by the President (Sir Samuel Evans), that the cargo could be properly condemned as the seizure took place after iron ore had been declared contraband; but the shipowners were, in the circumstances, entitled to freight, though not to demurrage, as the temporary detention of a neutral vessel by a belligerent was an unfortunate result of a state of war. *THE KATWIJK*
Evans, Pres. 177

17. — *Neutral Ship—Contraband Cargo—Destination to Enemy Port—Condemnation of Vessel—Practice of Maritime States—Order in Council adopting art. 40 of Declaration of London, 1909—Validity.*

Neutral Ship—Contraband Cargo—Destination to Neutral Port—Ultimate Enemy Destination—Knowledge of Shipowner—Condemnation of Vessel.

Apart from the provisions of art. 40 of the Declaration of London, 1909, the attitude and action of the chief maritime States before and since the International Naval Conference of 1908-1909 justify the Prize Court in accepting as part of the law of nations the rule that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, or freight, forms more than half the cargo."

Where such a proportion of contraband is being carried it is not necessary to prove knowledge on the part of the master or owner that the cargo is destined for the enemy.

The provisions of art. 40 are a limitation of the rights of the Crown, and therefore, in accordance with the doctrines laid down in *The Zamora* [1916] 2 A. C. 77, an Order in Council adopting those provisions is valid.

Held, therefore, in the case of the *Hakan*, that a neutral vessel, captured while carrying a full cargo of conditional contraband to an enemy base supply, was subject to condemnation; and in the case of the *Maracaibo*, that the like penalty was incurred by a neutral vessel

PRIZE COURT—continued.

carrying to a neutral port a full cargo of contraband ultimately destined for the enemy. *THE HAKAN. THE MARACAIBO* Evans, Pres. 266

18.—*Neutral Ship—Contraband Cargo—Intention to Supply Coal to Enemy Warships—False Papers—Circumstances of Fraud—Abandonment of Voyage—Disposal of Cargo—Capture on Return Voyage—Restitution—Costs.*

The general rule of prize law is that when contraband goods have been discharged the liability of the carrying vessel to seizure is at an end. But a neutral vessel which, by means of false papers or other deceitful practices to elude capture, has carried a contraband cargo to the enemy, remains subject to confiscation on the return voyage. If, however, the intention and voyage have been clearly abandoned before the delivery of the cargo to the enemy the vessel is exempt on the return voyage.

A Dutch vessel left a British port with a cargo of coal ostensibly consigned to a firm at Buenos Aires, but in fact intended for German warships. On arrival at Tenerife the master found that he was suspected, and abandoned the voyage and sold the cargo. In the course of her return voyage to her home port with a cargo of ore shipped at an intermediate Spanish port the vessel put into Falmouth, where she was seized as prize :—

Held, that she must be restored to her owner, but that, as he was an active party in an attempt to convey contraband to the enemy by means of false and fraudulent devices, he must pay the costs of the capture and detention and of the prize proceedings. *THE ALWINA*

Evans, Pres. 131

19.—*Neutral Ship—Unneutral Service—Capture in Neutral Territorial Waters—Validity—Hague Conference, 1907, Convention XIII., arts. 1 and 2.*

Assuming that Convention XIII. of the Hague Conference, 1907, respecting the rights and duties of neutral Powers in maritime war, is a binding Convention, it has not modified the well established rule of international law that neither an enemy, nor a neutral acting the part of an enemy, can claim the restitution of captured property on the sole ground that the capture took place within neutral territorial waters; it is only by the neutral State whose neutrality has been violated that the validity of the capture can be questioned. *THE BANGOR*

Evans, Pres. 181

20.—*Outbreak of War—Voyage of British Ship diverted—Seizure and Sale of Cargo—Proceeds released subject to Freight and Charges—Reference—Jurisdiction of Common Law Court and Prize Court.*

Shortly before the outbreak of war a British ship left a Russian port in the Black Sea with a grain cargo for Hamburg, and on the declaration of war between Great Britain and Germany her owners, at the suggestion of the British Admiralty, diverted the vessel to a British port where the cargo was seized by the Customs authorities, and subsequently sold by the Marshal, the proceeds being paid into Court.

PRIZE COURT—continued.

The Russian Bank for Foreign Trade, as owners, claimed the proceeds of part of the cargo, namely, two parcels of barley, and the amount was paid out to them subject to a claim by the shipowners for freight and charges :—

Held by the President (Sir Samuel Evans), that, though at common law no freight was due as the contract of affreightment had not been carried out, and had become illegal by reason of the war, the Prize Court, acting on equitable principles (see *The Juno* [1916] P. 169), would allow such a fair and reasonable sum in respect of freight and charges as should be ascertained by a reference. *THE IOLO* - Evans, Pres. 206

21.—*Prize Bounty—Destruction of Enemy Warship—Amount of Bounty distributable—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42—Order in Council of March 2, 1915.*

By an Order in Council of March 2, 1915, pursuant to the provisions of s. 42 of the Naval Prize Act, 1864, His Majesty declared his intention to grant as prize bounty for distribution among such of the officers and crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement" :—

Held, that, provided they form part of the crew and are in attendance in some form or other on the ship doing work in the capacity of members of the crew, it is not necessary for all the persons in respect of whom the prize bounty is payable to be actually on board the enemy ship at the beginning of the engagement. *THE SYDNEY* - Evans, Pres. 300

22.—*Salvage on Recapture—Neutral Vessel—Capture by Belligerent Cruiser—Liability to Destruction or Condemnation—Recapture by British Cruiser—Principles on which Prize Salvage will be awarded.*

By the law of nations, the general rule is that no salvage is due for the recapture of a neutral vessel, upon the principle that the liberation of a bona fide neutral from the enemy confers no benefit upon the neutral, inasmuch as the enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized. But where the vessel recaptured was practically liable, whether rightfully or wrongfully, to be confiscated by the enemy, salvage will be awarded to the recaptors.

Thus, where a German cruiser had captured a Greek vessel laden with a cargo of coal belonging to British merchants and destined for the North Western State Railway of India on the ground that she was carrying contraband, and the vessel was recaptured by a British cruiser, the Court, being of opinion that the recapture saved the vessel from condemnation in any German prize proceedings or from the almost certain risk of destruction if dealt with by the captors on the high seas, awarded to the recaptors as prize salvage one-sixth of the vessel's value, 7333*l.* *THE PONTOPOROS* -

Evans, Pres. 100

PROBATE—*Irish Grant*—*Grant in Ireland to Irish Executor*—*English Assets*—*Resealing Irish Grant*.

Sect. 95 of the Irish Probate Act, 1857 (20 & 21 Vict. c. 79), which enables an Irish grant to be resealed in England, does not take away the power of the English Court to grant probate or letters of administration in cases where the Irish grant has not in fact been resealed. *IRWIN v. CARUTH* - - - *Horridge J. 23*

2. — *Sailor*—*Member of St. John's Ambulance Association*—*Letter written at Home after Order for Mobilization*—*Invalidity*—*Wills Act, 1837 (1 Vict. c. 26), s. 11.*

A member of a local corps of the St. John's Ambulance Association, being about to start from home under orders to join *H.M.S. Pembroke*, permanently stationed at Chatham, wrote out at home on the morning of his departure a document disposing of his property. He remained in barracks at Chatham and did not go on board ship till he joined a transport on August 17, 1914, and he was wrecked in her on October 30, 1914 :—

Held, not within the exceptions in s. 11 of the Wills Act. *In re ANDERSON'S ESTATE. ANDERSON v. DOWNES* - *Bargrave Deane J. 49*

3. — *Soldier*—*Will of*—*Unattested Paper*—*Wills Act, 1837 (1 Vict. c. 26), s. 11*—*Paper written by Female Nurse on Leave after receiving Orders to rejoin*—*Executor according to the Tenor.*

A nurse, employed under contract by the War Office on hospital ships, wrote a letter giving the addressee full liberty to deal with her affairs and giving directions as to the disposal of her property. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark :—

Held, that the letter, which was unattested, was privileged as a soldier's will within the meaning of the Wills Act, 1837, s. 11, and that the person to whom it was addressed was executor according to tenor, and, as such, entitled to probate of the document. *In re ADA STANLEY'S ESTATE* - - - *Bargrave Deane J. 192*

4. — *Soldier*—*Wills Act, 1837 (1 Vict. c. 26), s. 11.*

Where it appeared that the military authorities thought it undesirable that portions of a letter which included a military will should be published, the Court directed that the person applying for the grant should be at liberty to offer for probate so much only of the letter as was testamentary or necessary for the understanding of the testamentary part. *In re HEYWOOD'S ESTATE* - - *Bargrave Deane J. 47*

REGISTER—British ship owned by company controlled in Germany - - - *241*
See SHIPPING. 4.

RELEASE OF PROCEEDS—Seizure of cargo—Jurisdiction - - - *195*
See PRIZE COURT. 11.

REQUISITION BY ADMIRALTY—Tug—Right to salvage—"King's ship"—Ship "belonging to His Majesty" - *306*
See SHIPPING. 6.

RESPONDENT.

See DIVORCE.

RESTITUTION.

See PRIZE COURT.

"RETALIATORY" ORDER IN COUNCIL OF MARCH 11, 1915—Validity - *123*

See PRIZE COURT. 15.

SALVAGE.

See PRIZE COURT and SHIPPING.

SEAWORTHINESS.

See SHIPPING.

SEIZURE.

See PRIZE COURT.

SERVICE—Petition - - - *324*
See DIVORCE. 12.

SERVICE ABROAD—Respondent on—Petition—Service - - - *324*
See DIVORCE. 12.

SHIPOWNER'S EXPENSES—Compulsory deviation - - - *217*
See PRIZE COURT. 10.

SHIPPING—*Compulsory Pilotage*—*Collision*—*Damage*—*Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 633*—*Contributory Negligence of Master and Crew*—*Onus of Proof.*

In an action of damage by collision, in which the defence of compulsory pilotage is pleaded, the onus probandi lies, in the first instance, on the plaintiffs to establish a case of negligent navigation on the defendants' ship. The defendants must then prove that a compulsory pilot was in fact in charge; that the negligent navigation was due solely to the fault of the pilot—that is to say, that the particular negligent acts or defaults found by the Court to have caused the collision were committed by the pilot himself, or by the master and crew in obedience to the pilot's orders; and if, in addition, evidence is adduced by the plaintiffs, or obtained from the defendants' own witnesses, or is in any other way forthcoming, that there were also acts or defaults on the part of the master or crew which might have contributed to the collision, the defendants must further satisfy the Court that such acts or defaults did not in any degree contribute to the collision. *THE BENUE* - - *Evans, Pres. 88*

2. — *Compulsory Pilotage*—*English Pilot*—*Foreign Crew*—*Assistance from Ship's Officers.*

In an action of damage by collision the Court below found that both vessels were equally to blame, and that the plea of compulsory pilotage raised by the plaintiffs, by way of defence to the defendants' counter-claim, failed on the ground that the English pilot had not received from the Swedish crew the assistance to which he was entitled, for, in particular, the Swedish reports, received from forward, had not been repeated or interpreted to him, nor had the pilot's attention been drawn to the international rules of the road at sea in respect of the reduction of speed in fog :—

Held by the Court of Appeal (Buckley, Pickford, and Banks L.JJ., assisted by two nautical

SHIPPING—continued.

assessors), that the plaintiffs were not liable for the damage sustained by the defendants' vessel, as interference with the pilot, in the way suggested, was not justifiable except in cases of extreme urgency.

Decision of Bargarve Deane J. reversed.
THE APE - - - - - C. A. 303

3. — *Compulsory Pilotage—Notice to Mariners, March 27, 1915—"Conducting" Vessel—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 603, 625—Pilotage Act, 1912 (2 & 3 Geo. 5, c. 31), ss. 14, 15.*

The defendants' vessel was, at the time of a collision with the plaintiffs' vessel, being "conducted" by a pilot licensed by the London Trinity House, in accordance with the Defence of the Realm (Consolidation) Regulations, 1914. The pilot having been found alone to blame:—

Held by Bargarve Deane J., that though the defendants' vessel was an exempt ship under the Merchant Shipping Act, 1894, and, therefore, the defendants could not have availed themselves of the defence of compulsory pilotage, the pilot actually "conducting" the vessel was, under the new and temporary regulations, compulsorily in charge in the sense that the defendants were not liable for his wrongful acts. THE NORD

Bargarve Deane J. 53

4. — *Forfeiture—British Company controlled in Germany—Principal Place of Business of Company—Position of British Shareholders—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 1, 9, 76—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 51.*

By s. 1 of the Merchant Shipping Act, 1894, "a ship shall not be deemed to be a British ship unless owned wholly by . . . (d) bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions."

A ship registered as a British ship was owned by a company registered as a British company under the Companies Acts. Doubts having arisen as to the title of the ship to be registered as a British ship, the Commissioners of Customs and Excise, pursuant to the provisions of s. 51 of the Merchant Shipping Act, 1906, directed the plaintiff, the registrar of shipping at the ship's port of registry, to require evidence to be given to his satisfaction that the ship was entitled to be so registered. The evidence adduced established that the affairs of the company from the time the ship was bought and put upon the register were directed from Hamburg by the chairman of the board of directors, a naturalized British subject of German origin, who held the majority of the shares and resided at Hamburg both before and after the outbreak of war between Great Britain and Germany. Accordingly, proceedings for forfeiture were instituted in accordance with the provisions of s. 76 of the Merchant Shipping Act, 1894:—

Held, that the principal place of business of the company was not within His Majesty's dominions, and that the ship, therefore, was forfeit to the Crown.

SHIPPING—continued.

Decision of Bargarve Deane J. [1916] P. 117 affirmed.

Motion for relief on behalf of British shareholders in the company rejected. THE POLZEATH - - - - - C. A. 241

5. — *Salvage—Requisitioned Ship—Action in rem—Motion on behalf of Crown to stay Proceedings—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557—Proclamation of August 3, 1914 (Transports and Auxiliaries)—Costs.*

After the outbreak of war, the plaintiffs, the owners, master, and crew of a steam tug, commenced a salvage action in rem against the owners of a steamship, her cargo and freight; but they did not arrest the vessel, and subsequently abandoned the claim against the cargo, which consisted of oil fuel for the use of the Navy, and was the property of the Crown. The owners of the steamship and her freight appeared as defendants, and gave the usual undertaking in lieu of bail, statements of claim and defence being subsequently delivered.

Prior to the commencement of the salvage action the steamship had been requisitioned under the powers conferred by the Royal Proclamation (Transports and Auxiliaries) of August 3, 1914, and as the vessel thereby became, for the time being, a ship belonging to His Majesty, within the meaning of s. 557 of the Merchant Shipping Act, 1894, the Crown applied for and, (on appeal), obtained an order that all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as the vessel remained under requisition in the service of the Crown, as, by reason of the requisition, the vessel, for the time being, belonged to the class of "things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession and judicial sale incident to such proceedings would divert them from those public uses to which they are destined" (*The Parlement Belge* (1880) 5 P. D. 197, 210). There would be no order as to costs on the ground that the intervention was direct on behalf of the Crown, and not through the Lords Commissioners of the Admiralty, so that the Admiralty Suits Act, 1868, did not apply. THE BROADMAYNE - - - - - C. A. 64

6. — *Salvage—Tug requisitioned by Admiralty under Proclamation—Right to Salvage—"King's Ship"—Ship "belonging to His Majesty"—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 557.*

By s. 557 of the Merchant Shipping Act, 1894, "Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service"

SHIPPING—continued.

The Admiralty, acting under the powers conferred by a Proclamation of August 3, 1914, requisitioned the plaintiffs' tug *Simla*, and sent her to Kirkwall Bay in the Orkneys. While stationed there the *Simla*, with the consent of the commander of the Northern Patrol, rendered valuable salvage services to the *Sarpen*, which had run upon the rocks in the vicinity. At this time no terms and conditions of employment of the *Simla* had been agreed to by the plaintiffs and the Admiralty, but terms were afterwards arranged:—

Held, that the effect of the requisitioning by the Admiralty under the Proclamation was not to make the *Simla* a ship "belonging to His Majesty" within the meaning of s. 557 of the Merchant Shipping Act, 1894, nor did the terms and conditions of the hiring have that effect, and that therefore the owners, master, and crew were entitled to prosecute a claim for salvage. *THE SARPEN* - - - C. A. 306

7. — *Seaworthiness—Ship fit to carry Cargo—Improper Stowage—Bill of Lading—Excepted Perils.*

Cases of chocolate laden on board the defendants' steamship and consigned to the plaintiffs were delivered in a deteriorated condition owing to the cases having been stowed in the same hold as a number of gorgonzola cheeses. The defendants relied on an exception in the bill of lading relieving them from liability for negligent stowage. The plaintiffs replied that the defendants could not rely on any of the exception clauses inasmuch as when the chocolate was loaded and/or the voyage commenced the ship "was not seaworthy or fit for carrying the chocolate in that the chocolate was carried where it was liable to become, and did become, tainted by cheese":—

Held, affirming the decision of Bargrave Deane J., that the ship was not unseaworthy; that the damage was caused by improper stowage; and that the defendants were protected by the exception in the bill of lading. *THE THORSA* - - - C. A. 257

STATUTES:—

1837.

1 Vict. c. 26 (Wills), s. 11: *In re ADA STANLEY'S ESTATE* - - - 192

1864.

27 & 28 Vict. c. 25 (Naval Prize), s. 42: *THE SYDNEY* - - - 300

1894.

57 & 58 Vict. c. 60 (Merchant Shipping), s. 1: *THE ST. TUDNO* - - - 291

— ss. 1, 9, 76: *THE POLZEATH* - - - C. A. 241

— ss. 1, 76: *THE POLZEATH* - 117

STATUTES—continued.

57 & 58 Vict. c. 60, s. 557: *THE BROADMAYNE* - - - C. A. 64

THE SARPEN - - - C. A. 306

— s. 633: *THE BENUÉ* - - - 88

1906.

6 Edw. 7, c. 48 (Merchant Shipping), s. 51: *THE POLZEATH* - - - C. A. 241

1907.

7 Edw. 7, c. 12 (Matrimonial Causes), s. 1: *HULTON v. HULTON* - - - C. A. 57

STOWAGE—Improper—Bill of lading—Excepted perils - - - 257
See SHIPPING. 7.

SUBSTITUTED SERVICE OF CITATION AND PETITION - - - 324
See DIVORCE. 12.

TRANSPORTS AND AUXILIARIES PROCLAMATION OF AUGUST 3, 1914: THE BROADMAYNE - - - C. A. 64

TUG—Requisition by Admiralty—Right to salvage - - - 64, 306
See SHIPPING. 5, 6.

TURKISH CAPITULATIONS SYSTEM.
See PRIZE COURT.

TURKISH CARGO—British ship—Discharge in British port - - - 78
See PRIZE COURT. 12.

UNATTESTED PAPER.
See PROBATE.

UNSEAWORTHY SHIP.
See SHIPPING.

VOYAGE.
See PRIZE COURT.

WAR—Outbreak of.
See PRIZE COURT.

WARSHIP—Enemy—Destruction—Bounty - - - 300
See PRIZE COURT. 21.

WIFE'S COSTS.
See DIVORCE.

WILL—Soldier.
See PROBATE.

WORDS:—
— "Belonging to His Majesty" (Ship):
THE SARPEN - - - C. A. 306
— "King's ship": *THE SARPEN* - - - C. A. 306

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